

CONSTRUCTION OF THE UNIFORM COMMERCIAL CODE: UCC SECTION 1-103 AND "CODE" METHODOLOGY

ROBERT A. HILLMAN*

The need for predictability in business transactions provided the basic impetus toward promulgation of a commercial code in this country.¹ Movement toward legal uniformity in the various jurisdictions comprising our domestic commercial world was viewed as both an opportunity to promote certainty, and hence efficiency, as well as to improve existing commercial law by simplifying and modernizing it.² Yet, prior to the promulgation of the Uniform Commercial Code (the UCC or Code),³ disagreement existed concerning how best to achieve these generally desired goals of uniformity and improvement of our commercial law.⁴ Code proponents maintained that a code

*Associate Professor of Law, University of Iowa School of Law. The author wishes to thank Charles Pulaski and David Vernon, professors of law at the University of Iowa School of Law, for reading and commenting upon an earlier draft of this article.

I also wish to acknowledge the aid of my father, the late professor Herman D. Hillman, professor of law at Hofstra University School of Law, who reviewed a draft of this article, and much more importantly, whose career of public service and teaching excellence has been and will always be an inspiration to me.

¹ See Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. Ill. L. F. 291, 293-96; *Uniform Commercial Code Commentary*, 8 B.C. IND. & COM. L. REV. 568, 569-70 n.8 (1967) [hereinafter cited as *UCC Commentary*].

The primary thrust towards codification in the United States resulted from the large increase in the number of reported cases in the late nineteenth century, and the "breakdown" in the case law system this engendered. Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L. J. 1037, 1041-42 (1961). For a general overview of the history behind the codification of commercial law see D. KING, C. KUENZEL, T. LAUER, N. LITTLEFIELD & B. STONE, *COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* 1-14 (1974).

² See Hawkland, *supra* note 1, at 298; *UCC Commentary*, *supra* note 1, at 569. The underlying "purposes and policies" of the UCC are set forth in § 1-102(2):

- (a) to simplify, clarify and modernize the law governing commercial transactions;
- (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
- (c) to make uniform the law among the various jurisdictions.

³ In 1951 the first official text of the Uniform Commercial Code was promulgated. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 4 (1972) [hereinafter cited as *WHITE & SUMMERS*]. In 1953 Pennsylvania enacted the Code and by 1968 forty-nine states had done so. Louisiana adopted 4 of the 10 Articles of the Code in 1974. 1A *UNIFORM LAWS ANNOTATED* 5 (Master ed. Supp. 1977). Unless otherwise indicated, all citations to the Code are to the 1972 official version.

⁴ For a thorough discussion of the arguments for and against codification, see generally Patterson, *The Codification of Commercial Law in the Light of Jurisprudence*, in NEW YORK LAW REVISION COMMISSION, *REPORT OF THE LAW REVISION COMMISSION FOR 1955: I STUDY OF THE UNIFORM COMMERCIAL CODE* 41, 55-74 (1955) [hereinafter cited as *Patterson*].

would be orderly, systematic and precise in promoting these policies.⁵ In contrast, opponents contended that no matter how thoughtfully and concisely drafted, all code provisions would ultimately prove ambiguous in relation to some disputes, and resort to case law would be necessary.⁶ This case law development, in turn, would destroy the desired uniformity and effectively render the Code meaningless.⁷ Judicial conservatism—an unwillingness to accept new Code rules and methodology—was conceived as an additional stumbling block.⁸ For primarily these reasons,⁹ Code critics asserted that the Code could not succeed as uniform law.

Some analysts, aware of these criticisms and of previous failures to unify the law,¹⁰ predicted that the Code's success or failure would

⁵ Patterson, *supra* note 4, at 57. See generally Diamond, *Codification of the Law of Contract*, 31 MOD. L. REV. 361, 372-75 (1968). One Code proponent noted that:

The Code is an effort to break up [the Uniform Acts], to modernize them to put them into a coherent and accessible form, to add to them a large body of material that should have been put into them before but has not, and to clarify the frequent case law disputes that have arisen.

Llewellyn, *Why a Commercial Code?* 22 TENN. L. REV. 779, 779 (1953). For a discussion of the Uniform Acts see note 7 *infra*.

⁶ Patterson, *supra* note 4, at 58.

⁷ *Id.* This is essentially what destroyed the usefulness of the original attempts at unification of commercial law through statutory enactment, the Uniform Acts. (The Uniform Acts may be found in UNIFORM LAWS ANNOTATED.) Courts viewed them merely as restatements of the common law which they were free to construe in accord with their own previous common law interpretations. *Gilmore, supra* note 1, at 1044. Eventually, through case law interpretation, the Uniform Acts took on different meaning in each jurisdiction. For example, by 1940, eighty out of one hundred ninety-eight sections of the Negotiable Instruments Act, were construed differently by different jurisdictions. See Schnader, *Why the Commercial Code Should Be Uniform*, 20 WASH. & LEE L. REV. 237, 239 (1963). But see Beutel, *The Proposed Uniform Commercial Code As a Problem in Codification*, 16 *Law & Contemp. Prob.* 141, 141 (1951), indicating that under the Uniform Laws "substantial uniformity of legislation" was accomplished. For a general discussion of the original attempts at unification of commercial law through statutory enactment see Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799 (1958).

⁸ One commentator noted that:

"a code is intended to replace the earlier common law. How can one ensure that the judges, brought up on the common law and familiar with it, will wipe out their knowledge of the cases from their memories and concentrate on the statutory words?" Diamond, *supra* note 5, at 375.

The failure of the courts to utilize the Uniform Acts in solving commercial disputes justifiably fueled the arguments of Code opponents. Under the Uniform Laws, courts schooled in judicial conservatism, returned to case law for dispute determination. See Murray, "Under the Spreading Analogy of Article 2 of the Uniform Commercial Code" 39 FORDHAM L. REV. 447, 448 (1971).

⁹ Other problems anticipated by Code critics were that: Code language would be wedded to historic meanings derived from common law, Patterson, *supra* note 4, at 60; and that Code language would be "open-ended" and therefore not interpreted uniformly, *id.* at 63, WHITE & SUMMERS, *supra* note 3, at 7.

¹⁰ See D. KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* 8-9 (1968). "Major portions of . . . uniform acts were . . . eroded away or unduly encumbered with judicial idiosyncrasies and failure to grasp the underlying policies of provisions in those statutes It is against this type of danger which the Code must be protected."

ultimately depend upon the extent to which courts would interpret it as a "true code."¹¹ A true code, it was explained, is self-explanatory—"a preemptive, systematic, and comprehensive enactment of a whole field of law."¹² Under the true code approach, then, a court should look no further than the code itself for solution to disputes governed by it—its purposes and policies should dictate the result even where there is no express language on point.¹³ Problems in interpreting code language not defined within the code explicitly also would be resolved by reference to the Code's purposes and policies. The role of prior case law within this scheme is abundantly clear—it should not be employed in solving code problems, either to interpret the code *or* to fill in gaps.¹⁴ True code methodology was thus "de-

¹¹ Hawkland, *supra* note 1, at 299. See King, *supra* note 10, at 5-6. "True code" and "true code methodology" are terminology borrowed from Professor Hawkland. Hawkland, *supra* note 1, at 292-93.

The distinction sometimes made between "interpretation" of a statute (determining the meaning of the language), and "construction" of a statute (the process of application of the statute to a given case after the meaning of the words is ascertained) is not emphasized here. The boundaries between the two concepts are often unclear. See F. de Sloovere, *Preliminary Questions in Statutory Interpretation*, 9 N.Y.U. L. Q. 407, 407-10 (1932); Beutel, *Interpretation, Construction and Revision of the Commercial Code: The Presumption of Holding in Due Course*, 1966 WASH. U. L.Q. 381, 386-89.

¹² Hawkland, *supra* note 1, at 292; King, *supra* note 10, at 9. A true code "displaces all other law in its subject area save only that which the code excepts" and "form[s] an interlocking, integrated body, revealing its own plan and containing its own methodology." A true code "is comprehensive in that it is sufficiently inclusive and independent to enable it to be administered in accordance with its own basic policies." Hawkland, *supra* note 1, at 292 (footnote omitted).

¹³ King, *supra* note 10, at 9. The proponents of "true code methodology" realized that the Code could not be all-inclusive, "superseding" all prior uncoded law dealing with [the] subject matter and includ[ing] . . . all of the law on [the] subject matter." Patterson, *supra* note 4, at 67; Hawkland, *supra* note 1, at 309. But Professor Hawkland pointed out that even the civil law, from which true code methodology is derived, is no longer concerned with completeness because attention is on developing "systematic methodology" to fill in the gaps. *Id.* at 309. By developing a similar methodology the Code could be comprehensive without being pre-emptive. *Id.* at 309-10. True code methodology proponents therefore believed that the Code should be its own best evidence of what it means. See *id.* at 310.

The notion that gaps should be filled by reference to Code principles instead of by resort to case law was considered a "radical departure" for a common law country. Diamond, *supra* note 5, at 378-79. Common law jurisprudential tradition would not permit such an idea to be taken seriously. *Id.* at 379, citing 1 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* VIII (1965). See also Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 285-86 (1966). But see Beutel, *supra* note 11, at 388, quoting Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908). Dean Pound suggested that legislation which supplied not only the rule to be applied, but the "principle from which to reason," would be superior to judge-made rules and would be the methodology of the future. Pound, *supra*, at 385-86.

¹⁴ King, *supra* note 10, at 9. One commentator has stated:

A 'code,' . . . is a legislative enactment which entirely pre-empts the field and which is assumed to carry within it the answers to all possible questions: thus when a court comes to a gap or an unforeseen situation, its duty is to find, by extrapolation and analogy, a solution consistent with the policy of the codifying law; the pre-Code common law is no longer available as an authoritative source.

signed to give the enactment comprehensiveness and to implement legislative design,"¹⁵ and was advanced as the solution to the possibility that case law would dilute the impact of the Code.

Following the promulgation of the Uniform Commercial Code, proponents of true code methodology found evidence supporting their interpretive approach in Code section 1-102(1), which states: "[t]his Act shall be liberally construed and applied to promote its underlying purposes and policies." True code proponents took the position that this section reflected an intent of the framers essentially to displace case law methodology with true code methodology.¹⁶ Indeed, one leading commentator suggested that "[t]he effect of this language is that the [C]ode not only has the force of law, but is itself a source of law."¹⁷ Section 1-102(1) was thought to demonstrate explicit Code recognition of the importance of reasoning by internal analogy when gaps had to be filled.¹⁸

Despite the inclusion of section 1-102(1) in the Code the proponents of true code methodology correctly realized that "no law or set of laws can exist in isolation," and that some reference to "outside" law would at times be inevitable.¹⁹ In addition, the framers of the Code, possibly for policy reasons, explicitly left for case law resolution some subjects within the ambit of commercial law.²⁰ Code acknow-

Gilmore, *supra* note 1, at 1043.

Reasoning that the Code's "legislative policy" is to achieve uniformity, one court stated that:

The realization of this purpose demands that *so far as possible* the meaning of the law be gathered from the instrument itself, unfettered by anachronisms indigenous to the respective jurisdictions in which it is in force. Accepting that principle, we adopt as a rule of construction that the Code is plenary and exclusive except where the legislature has clearly indicated otherwise.

Lincoln Bank & Trust Co. v. Queenan, 344 S.W.2d 383, 385 (Ky. 1961).

For a discussion of the role of stare decisis under the Code see Hawkland, *supra* note 1, at 318-19; Diamond, *supra* note 5, at 378.

¹⁵ Hawkland *supra* note 1, at 314.

¹⁶ *Id.* at 303; Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 330, 333 (1951). See also King, *supra* note 10, at 10-11.

¹⁷ Franklin, *supra* note 16, at 333.

¹⁸ Hawkland, *supra* note 1, at 303, quoting Franklin, *supra* note 16, at 333.

¹⁹ Hawkland, *supra* note 1, at 311. See note 13 *supra*.

²⁰ The drafters of the Code may have felt that certain matters would better develop by case law determination. For example, the extension of warranties to persons other than the direct parties of a contract was purposefully left to the case law. The official comment to § 2-313 states:

[T]he warranty sections of the Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract . . . the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

U.C.C. § 2-313, Comment 2. See U.C.C. § 2-318, Comment 3; cf. Hawkland *supra* note 1 at 311-12; Schlesinger, *Study of Uniform Commercial Code Article 5*, in NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1955: 3 STUDY OF THE UNIFORM COMMERCIAL CODE 1575, 1718-19 (1955).

ledgement of the availability of "outside" law is found in section 1-103, which provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." The official Comment to this section adds that the "listing" in Section 1-103 is "merely illustrative; no listing could be exhaustive."²¹ Thus, under section 1-103, in the absence of particular provisions of the Code displacing the general rules of law and equity, the general rules would apply.

The tension that exists between section 1-103, which directs the courts to supplement the Code with outside law, and the true code methodology of section 1-102(1), in which courts find answers *within* the Code framework, is the focus of this article. It is the task here to suggest how courts, mindful of both the true code approach and of section 1-103, should solve Commercial Code construction problems. In suggesting an approach to such problems, it will be necessary to recognize that section 1-103, if too expansively interpreted, could threaten the uniformity, simplification, and modernization of commercial law embodied in the Code.²² Yet, at the same time, in view of the explicit recognition given by the framers of the Code to the role of common law and equitable rules,²³ it is necessary to construct an interpretive approach which accords at least a limited function to section 1-103 in resolving construction problems. After analyzing the case law, which indicates that a serious problem in over-usage of section 1-103 does exist,²⁴ this article will suggest a three step priority

²¹ U.C.C. § 1-103, Comment 3. Prior Uniform Acts contained language similar to § 1-103. Section 196 of the Uniform Negotiable Instruments Act, 5 UNIFORM LAWS ANNOTATED (1943) provided:

"In any case not provided for in this act the rules of [law and equity including] the law merchant shall govern". The accompanying note stated:

The words in brackets [law and equity including] were inserted to bring this section in harmony with the Uniform Sales Act (section 73), the Uniform Warehouse Receipts Act (section 56), the Uniform Transfer of Stock Act (section 18) and the Uniform Bills of Lading Act (section 51). The object of sections such as these is to clearly point out that no one of these acts pretends to be a complete codification of the whole law upon each topic but that there are cases not provided for in each of these acts. Another purpose is to leave room for the growth of new usages and customs so that none of these acts should put the law merchant in a straight-jacket and thus prevent the further expansion of the law merchant.

²² To the extent that common law and equitable rules vary from jurisdiction to jurisdiction, uniformity is threatened by their invocation. Simplification and modernization of commercial law will similarly be thwarted to the extent that Code policies suggest a different and better result than the common law and equitable rules which may be invoked.

²³ For the sake of simplicity the term "common law" will be used throughout this article to refer to both principles of law and equity which, under the merged system and with the exception of a few jurisdictions, are administered in one court.

²⁴ Not all cases discussed in this article specifically cite § 1-103 as authority for

system—express Code language, Code purposes and policies, and finally common law—as the proper vehicle by which to resolve Code construction problems. It will be submitted that this approach to problem solving places greater emphasis on Code policy as reflected in section 1-102(1), but also recognizes the importance of section 1-103. The last section of this article will then examine the proposed priority system in relation to some troublesome aspects of the remedies provisions of Article 2 of the Code.

I. CASE LAW UNDER SECTION 1-103

In this section cases which have invoked section 1-103 are analyzed both to determine how the courts are employing this section and to isolate problems in its application. The cases are generally categorized in four groups, representing the basic problems of construction inherent in the Code. Judicial use of section 1-103 will be examined: (1) where Code language is clear; (2) where the Code is silent; (3) where Code language is broad; and (4) where the Code is ambiguous.²⁵ This study will conclude that impediments to the success of the Code as a unifier and improver of commercial law result both from drafting weaknesses and from judicial reluctance to abandon the common law.

A. Response to Clear Code Directive

The Code, of course, has instituted many changes in the common law.²⁶ Many courts have recognized these changes and have applied the new rules correctly and without hesitation.²⁷ In addition, many courts have treated the Code as the comprehensive body of

the proposition that they may refer to common law. Nevertheless, it is assumed that the section is implicitly applied when common law is invoked.

²⁵ It is recognized, of course, that many of the cases contain some aspects of each kind of construction problem and, thus, do not fall neatly into categories. In addition, no effort has been made to categorize the cases by Articles of the Code. It is the position here that the problems discussed are common to all Articles.

²⁶ For a catalogue of some of these changes, see, e.g., King, *supra* note 10 at 20-98; Mooney, *Old Contract Principles and Karl's New Code: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213 (1966).

²⁷ See, e.g., *United States v. Wyoming Nat'l Bank*, 505 F.2d 1064, 1068 (10th Cir. 1974) (seller's right of reclamation under U.C.C. § 2-702(2) "eliminates any common law claim by a defrauded seller."); *Glenn Dick Equip. Co. v. Galey Constr. Inc.*, — Idaho —, 541 P.2d 1184, 1193 n.10 (1975) (recognizing that in U.C.C. § 2-316 (2) & (3) the Code placed limits on the doctrine of caveat emptor when buyer inspects, while at common law when buyer inspected no implied warranties would arise); *Blue Rock Indus. v. Raymond Int'l, Inc.*, 325 A.2d 66, 75 (Me. 1974) (contract enforceable although no precise measurement of price included in contract under U.C.C. § 2-204, which sanctions agreements although terms are left open); *Sunshine v. Bankers Trust Co.*, 34 N.Y.2d 404, 414 & n.6, 314 N.E.2d 860, 866 & n.6, 358 N.Y.S.2d 113, 122 & n.6 (1974) (U.C.C. § 4-407 conferred on a payor bank the substantive rights of subrogation even if the technical requirements of common law subrogation had not been met).

commercial law intended by the drafters.²⁸ In fact, courts frequently have applied Code rules to situations not controlled by the Code, reasoning that the Code rule is the state's "most recent expression" of the law.²⁹ It is fair to say that many jurists schooled in the common law and the Uniform Acts³⁰ are accepting the Code as stating the applicable law when it does so clearly.

But the story only begins here. There are many examples of judicial resistance to clearly stated Code provisions which have changed the common law. In these cases, courts have largely ignored express Code language, only to apply common law rules instead. Illustrative of judicial recalcitrance to Code change is the opinion of the First Circuit in *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*³¹ In *Roto-Lith* seller disclaimed all warranties in an acknowledgement of a purchase order even though buyer's order contained no limitation of seller's liability.³² The court held that seller's acknowledgement containing the disclaimer was a counter-offer which was accepted when buyer accepted the goods.³³ By following this common law approach, the court rendered meaningless sections 2-207(2) and 2-207(2)(b), under which the disclaimer should not have become part of the contract.³⁴

²⁸ See, e.g., *Universal C.I.T. Credit Corp. v. Shepler*, — Ind. App. —, 329 N.E.2d 620, 622 (1975) ("Although this is a case of tortious conversion the parties cannot, simply by bringing a suit in tort, ignore the fact that the contract here involved was one subject to the Uniform Commercial Code."); *Franklin Nat'l Bank v. Eurez Constr. Corp.*, 60 Misc. 2d 499, 301 N.Y.S. 2d 845 (Sup. Ct. 1969). The *Franklin* case is discussed in text at notes 206-14 *infra*.

²⁹ E.g., *William B. Tanner Co. v. WIOO, Inc.*, 528 F.2d 262, 270 (3rd Cir. 1975). See *Glenn Dick Equip. Co. v. Galey Constr. Inc.*, — Idaho —, 541 P.2d 1184, 1192-94 (1975).

³⁰ See note 7 *supra* for a discussion of the Uniform Acts.

³¹ 297 F.2d 497 (1st Cir. 1962).

³² *Id.* at 498-99.

³³ *Id.* at 500.

³⁴ U.C.C. § 2-207 changes the common law offer and acceptance rule that a response to an offer which is not precisely in accord with the offer is not an acceptance but a counter offer—the so-called "mirror image rule." The section states in part: "A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon . . ." U.C.C. § 2-207(1). U.C.C. § 2-207(2) provides that additional terms such as the warranty disclaimer are to be considered as "proposals for additions to the contract" and 2-207(2)(b) indicates that the proposals drop out of the contract when they "materially alter it." The court acknowledged in its opinion that the Code changed the common law mirror-image rule and that the clause in question materially altered the offer, but without explanation (other than that such an approach applied to the case would be "absurd") said that the Code approach could not be extended to the instant facts. 297 F.2d at 499-500. This deliberate rejection of explicit Code provisions has been widely criticized. E.g., WHITE & SUMMERS *supra* note 3, at 26-27; Note, 76 HARV. L. REV. 1481, 1482-84 (1963).

There are other examples of courts failing to follow express language of the Code and applying outside law instead. One such example is the use of the concept of "rescission" by courts, a concept which has largely been rejected by the Code. The word "rescission" at common law had at least four separate meanings. WHITE & SUMMERS, *supra* note 3, at 248. The term was used to refer to what is now rejection or revocation of acceptance under the Code; a buyer's act in returning goods; a buyer's cancellation of an

Some decisions resisting Code language specifically invoke section 1-103 as the justification for relying upon outside law. In *West Penn Administration, Inc. v. Union National Bank*,³⁵ for example, the court held that where a collecting bank accepted checks on forged endorsements but acted in a commercially reasonable manner, and the payee (another bank) had imputed knowledge of the fraud and did not notify the collecting bank, the payee was estopped from asserting the forgeries.³⁶ The collecting bank was liable to the payee's assignee in conversion, therefore, only to the extent of assets recovered from the wrongdoer.³⁷ In reaching this result, the court rested its decision on the "unjust enrichment" doctrine, which it invoked pursuant to section 1-103.³⁸ Yet, as the concurring opinion in the case pointed out, section 3-419(3) of the Code expressly mandated the re-

executory term of a contract; and a buyer's cause of action for fraud. *Id.*; cf. *Mooney*, *supra* note 26, at 238 n.36. To avoid the ambiguities that the use of such a concept would entail the Code has largely eliminated the principle and substituted for it new concepts—rejection and revocation of acceptance. See U.C.C. § 2-608, Comment 1 which states that § 2-608

no longer speaks of "rescission," a term capable of ambiguous application either to transfer of title to the goods or to the contract of sale and susceptible also of confusion with cancellation for cause of an executed or executory portion of the contract. The remedy under this section is instead referred to simply as "revocation of acceptance" of goods tendered under a contract for sale and involves no suggestion of "election" of any sort.

See also *Mooney*, *supra* note 26, at 238 n. 36.

Common law rescission has been preempted except, apparently, when there has been "mistake, fraud, or the like." WHITE & SUMMERS, *supra* note 3, at 248-49. See U.C.C. § 2-721 & accompanying Comment. Unfortunately courts have employed rescission, rejection, and revocation of acceptance terminology interchangeably, and apparently have failed to understand the intricacies of revocation of acceptance. WHITE & SUMMERS, *supra* note 3, at 249 n. 10. See, e.g., *Sarnecki v. Al Johns Pontiac*, 3 U.C.C. REP. SERV. 1121 (Pa. C. P. Luzerne County 1966) (court used the term rescission throughout the opinion to refer to a revocation of acceptance); *Moore v. Howard Pontiac-American, Inc.*, — Tenn. App. — 492 S.W.2d 227, 229 (1973) (relief sought was "rescission under [U.C.C. §] 2-608"); *DeCoria v. Red's Trailer Mart, Inc.*, 5 Wash. App. 892, 491 P.2d 241, (1971) (Neither parties nor judge at trial court level treated the case as one controlled by the Code. On appeal the term rescission was used throughout the opinion but no mention was made of U.C.C. § 2-608 and there apparently was no fraud involved).

Occasionally, a court has been more mindful of Code terminology. In *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972), the court held that buyer was permitted to revoke acceptance of a mobile home and recover damages even though she asked for rescission only. The court stated: "We need not now decide whether a buyer may still obtain a judicial rescission of the contract by virtue of pre-Code concepts of law or equity which have not been displaced. . . ." *Id.* at 396, 186 S.E.2d at 167. The court went on to find that buyer's "allegation of 'rescission' [would] be given effect . . . as an allegation of 'revocation of acceptance' since that Code concept more nearly reflect[ed] the claims asserted" by the buyer. *Id.*

³⁵ — Pa. Super. Ct. —, 335 A.2d 725 (1975).

³⁶ *Id.* at —, 335 A.2d at 735.

³⁷ *Id.* at —, 335 A.2d at 738.

³⁸ *Id.* at —, 335 A.2d at 738, citing D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.1 at 224 (1973).

sult reached by the majority.³⁹ If courts facing similar issues have two avenues to justify their results—Code and outside law, the latter pervaded by jurisdictional variations—the result of resorting to the outside law will be to engender confusion and perhaps disparity in commercial law, thereby eroding the mandate for simplicity and uniformity embodied in the Code.⁴⁰

Why do courts resist express Code language? Some courts, like their predecessors construing the Uniform Acts, seemingly are unwilling to accept Code change because of "preconceived idea[s] of end results which end results formerly followed under pre-Code law."⁴¹ Other courts may simply misunderstand Code directives.⁴² Still other courts have found that in some instances strict adherence to express language will result in unreasonable decisions contrary to the basic goals and policies of the Code. Accordingly, in recognition of the

³⁹ The concurring opinion stated that it "would not base the resolution of the case upon § 1-103 and principles of equity . . . because § 3-419(3) expressly mandates the result reached in this case." — Pa. Super. Ct. at —, 335 A.2d at 738.

⁴⁰ There are other examples of courts unnecessarily invoking common law rather than resting their holding on relevant Code provisions. In *Glenn Dick Equip. Co. v. Galey Constr. Inc.*, — Idaho —, 541 P.2d 1184, (1975), the court stated that the Code parol evidence rule: "is not necessarily a statement of the . . . rule distinct from the common law; rather, the drafters of the code . . . intended to incorporate the common law relevant to the . . . rule unless the common law was specifically excluded." *Id.* at —, 541 P.2d at 1191 (emphasis added). In *In re Hardin*, 458 F.2d 938, 940 (7th Cir. 1972), the court held that a financing agency which had an unperfected security interest may not exercise seller's right of reclamation under § 2-702. The court construed the "particular seller" language of 2-702(2) ("[I]f misrepresentation of solvency has been made to the particular seller . . . the 10-day limitations [for reclamation] does not apply.") to mean that the drafters intended to continue the common law requirement of reliance on the misrepresentation. *Id.* at 940-41. The court simply could have indicated that the financing agency was not a seller under § 2-702 and noted, as it did, that a result in favor of the financing agency would have circumvented the filing requirements of Article 9. *See id.* at 941. There was no need to invoke outside law. In *Guida v. Exchange Nat'l Bank of Tampa*, 308 So.2d 148, 152 (Fla. Dist. Ct. App. 1975), the court resorted to common law to substantiate its conclusion under § 3-606 that where a secured party impairs its collateral its rights are limited against the debtor.

⁴¹ Welsh, *Judicial Interpretations of the Filing Requirements Under Article Nine of the Code*, 37 TENN. L. REV. 273, 333 (1970). *See also* cases cited in note 40 *supra*.

Section 1-103 may be simply too great an invitation to jurists to continue their past pattern of resisting change. The failure of the previous attempts at uniformity in the commercial area due to judicial unwillingness or inability to follow the spirit of the reforms, *see* note 7 *supra*, does not suggest that courts, faced with the dilemma of whether to choose Code purposes and policies or conflicting common law in Code problem solving, will choose the former. Where the Code contains gaps, ambiguities and contradictions, it is much easier for courts to apply the common law rules with which they are familiar than to find solutions by analogy or from the purposes and policies of the code which contain many novel ideas.

⁴² *See Double-E Sportswear Corp. v. Girard Trust Bank*, 488 F.2d 292, 296 & n.4 (3rd Cir. 1973), where the majority appears to have misconstrued waiver under § 2-209(4), holding that the section provides for waiver of the statute of frauds, rather than a waiver of the individual contract term at issue.

To some extent, of course, a court's erroneous conclusions may be the result of unsatisfactory Code drafting. *See* notes 133-49 & accompanying text *infra*; R. SPEIDEL, R. SUMMERS & J. WHITE, *COMMERCIAL AND CONSUMER LAW* 44-54 (2d ed. 1974).

Code's mandate to interpret language liberally rather than technically, some courts have felt justified in permitting the Code's "underlying purposes and policies"⁴³ to prevail over express language. For example, in *Minsel v. El Rancho Mobile Home Center, Inc.*,⁴⁴ seller claimed that buyers were barred from revoking acceptance of a mobile home because they continued to live in it for six weeks after notifying seller of their intent to revoke acceptance.⁴⁵ The express Code language appears to support seller's argument. Section 2-608(3) states that a buyer who revokes acceptance "has the same rights and duties" with respect to the goods as if he had rejected them, and section 2-602(2)(a) on rejection provides that any exercise of ownership by buyer after rejection "is wrongful as against the seller." Although living in the mobile home for six weeks would appear to be an "exercise of ownership," the court nevertheless held that the buyers' conduct was reasonable under the circumstances, and found for buyers, citing section 1-102 and the "rule of reasonableness" as support for its decision.⁴⁶

The liberal approach of the court in *Minsel* suggests that where courts are faced with the dilemma of applying technical language or outside law which is *more* consistent with the Code's purposes and policies, the courts might sometimes choose the latter. It does not appear, however, that courts have often gone this far. A case illustrative of this judicial reluctance to opt against express Code language even where the result is contrary to Code policy is the decision by the New York Court of Appeals in *Adrian Tabin Corp. v. Climax Boutique, Inc.*⁴⁷ There, the court was faced with a problem arising under Article 6 of the Code, the bulk sales Article. A bulk transfer is defined as a transfer "not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory . . ."⁴⁸ Such a transfer is ineffective against creditors of the transferor unless, among other things, "[t]he transferee requires the transferor to furnish a list of his existing creditors . . ."⁴⁹ Under section 6-104(3), the responsibility for the accuracy and completeness of the list of creditors of the transferor is the transferor's.⁵⁰ That section adds that the trans-

⁴³ See U.C.C. § 1-102 & Comment 1.

⁴⁴ 32 Mich. App. 10, 188 N.W. 2d 9 (1971).

⁴⁵ *Id.* at 12, 188 N.W.2d at 10-11.

⁴⁶ *Id.* at 13-15, 188 N.W. 2d at 11-12. See U.C.C. § 1-102 Comment 1. This comment demonstrates that "the underlying policy of a given section may control over the language itself in certain instances." KING, *supra* note 10, at 12. See WHITE & SUMMERS, *supra* note 3, at 15-16 See also *In re Kalamazoo Steel Process, Inc.*, 503 F.2d 1218, 1224 (6th Cir. 1974); *Lines v. Bank of California*, 467 F.2d 1274, 1275-76 (9th Cir. 1972); *Maryland Nat'l Bank v. Porter-Way Harvester Mfg. Co.*, 300 A.2d 8, 11 (Del. Supr. 1972); *National Cash Register Co. v. Firestone & Co.*, 346 Mass. 255, 261, 191 N.E.2d 471, 474-75 (1963). But see *In re Mauck*, 378 F. Supp. 904, 906 (W.D. Va. 1974).

⁴⁷ 34 N.Y. 2d 210, 313 N.E.2d 66, 356 N.Y.S.2d 606, (1974).

⁴⁸ U.C.C. § 6-102(1).

⁴⁹ U.C.C. § 6-104(1)(a).

⁵⁰ U.C.C. § 6-104(3).

fer is not ineffective by reason of errors or omissions unless the transferee had knowledge. Since "knowledge" means actual and not constructive knowledge,⁵¹ under the Code the transferee need not seek out information as to whether the list is accurate. Section 6-104(3) is a major revision of the common law, which placed on the transferee the obligation to make "careful inquiry" as to the accuracy and completeness of the list of creditors.⁵² Since the major purpose of Article 6 is to protect creditors of transferors from fraud,⁵³ section 6-104(3) which permits a transfer to go forward without an inquiry by the transferee as to the transferor's truthfulness appears to be at loggerheads with that policy, while the common law rule seems to support the policy.⁵⁴ However, the *Adrian* court when faced with this problem applied section 6-104(3) on its own terms. The New York Court of Appeals held that section 6-104(3) did not require a transferee to make any inquiry as to the accuracy and completeness of the list of creditors.⁵⁵

In summary, when Code language is clear, it appears that some courts are too willing to resort to section 1-103 and a few courts may not be willing enough. Courts have sometimes ignored express Code language in favor of common law even when the language is consistent with overall purposes and policies of the Code. Yet, when the technical Code language is at loggerheads with its purposes and policies, some courts have refused to invoke common law which is consistent with those purposes and policies.

B. *Response When the "Plain Meaning" of the Code is Difficult to Ascertain*

Section 1-103 directs courts to "supplement" the Code with common law when it has not been "displaced."⁵⁶ Courts have been inconsistent in applying this provision, partially at least, because the words "supplement" and "displace" are not very instructive. Inconsis-

⁵¹ "A person 'knows' or has 'knowledge' of a fact when he has actual knowledge of it." U.C.C. § 1-201(25).

⁵² Note, 52 N.C. L. REV. 165, 165 (1973) and cases cited therein.

⁵³ U.C.C. § 6-101, Comment 2 states that one of the central purposes of bulk sales laws is to deal with the form of commercial fraud in which a merchant, owing debts, sells out his stock in trade to anyone for any price, pockets the proceeds, and disappears leaving his creditors unpaid. This type of fraud "represents the major bulk sales risk and its prevention is the central purpose [of Article (6)]." U.C.C. § 6-101, Comment 4.

⁵⁴ U.C.C. § 6-106, which requires the transferee to apply the consideration to the debts of seller and provides an additional 30 days from the date of notice to creditors for additional creditors to come forward and assert claims, mitigates the harshness of § 6-104(3). However, some jurisdictions like New York have not enacted § 6-106. See *Adrian Tabin Corp. v. Climax Boutique, Inc.*, 34 N.Y.2d 210, 215-16, 313 N.E.2d 66, 69, 356 N.Y.S.2d 606, 610 (1974).

⁵⁵ 34 N.Y.2d at 216, 313 N.E.2d at 69, 356 N.Y.S.2d at 610. The court was aware of the policies it disregarded: "We recognize . . . that strong reasons grounded in public policy and in the equities of the situation can be raised as a basis for imposing a duty of careful inquiry upon the transferee of a bulk sale." *Id.*

⁵⁶ See text accompanying note 21 *supra*.

tency also arises from the fact that section 1-103 may be potentially invoked in a wide variety of situations, ranging from complete Code silence to incomplete Code treatment, to broad or ambiguous use of terminology by the Code framers. This section will explore the manner in which courts have "supplemented" the Code through the common law where it has not been "displaced."

1. Code Silence

Courts have utilized section 1-103 to supplement the Code primarily in two situations involving Code silence: (1) where the Code is completely silent; and (2) where the Code does not fully treat subjects touched upon. The major use of section 1-103 appears to be in the former situation. Unlike *West Penn Administration*,⁵⁷ where section 3-419(3) should have been employed by the court, sometimes the Code simply does not set forth a specific solution to a problem or appear to indicate any position with respect to it. For example, the Code has not legislated with respect to the general rules of principal and agent, such as authority, ratification, and scope of duty.⁵⁸ The Code is thus completely silent with respect to setting forth principles and policies regarding the application of rules of agency; its sole reference to such rules is found in section 1-103 which does not give any *guidance* as to the application of the rules.⁵⁹ Many courts have invoked common law and equitable principles through section 1-103 to resolve these as well as other problems with respect to which the Code is otherwise completely silent.⁶⁰

⁵⁷ See notes 35-39 and accompanying text *supra*.

⁵⁸ See 1 R. ANDERSON, *ANDERSON ON THE UNIFORM COMMERCIAL CODE* §§ 1-103:8, 1-103:9 (2d ed. 1970).

⁵⁹ See text at note 21 *supra*.

⁶⁰ See, e.g., *Universal C.I.T. Credit Corp. v. State Farm Mut. Auto. Ins. Co.*, 493 S.W.2d 385, 390 (Mo. App. 1973) (auctioneer liable for breach of implied warranty of title unless name of principal is disclosed); *Leaderbrand v. Central State Bank*, 202 Kan. 450, 453, 450 P.2d 1, 4-5 (1969) (the court, citing § 1-103, found that law relative to principal and agent supplemented the provisions of § 3-403).

Other common law and equitable principles, besides rules governing principal and agent, which are specifically cited by § 1-103 as supplementing the Code when not displaced and which are commonly employed by courts, include capacity to contract, see, e.g., *Warwick Municipal Employees Credit Union v. McAllister*, 110 R.I. 399, 293 A.2d 516 (1972) (court relied on common law to resolve the issue and did not refer to the code); misrepresentation, see, e.g., *Ins. Co. of North Am. v. Brehn*, 478 P.2d 387 (Ore. 1970) (same); duress, see, e.g., *Austin Instrument Inc. v. Loral Corp.*, 29 N.Y.2d 124, 130-31, 272 N.E.2d 533, 535-36, 324 N.Y.S.2d 22, 25-26 (1971) (same); mistake, see, e.g., *Braund Inc. v. White*, 486 P.2d 50, 56 (Alas. 1971) (same); bankruptcy, see, e.g., *Wirth v. Heavey*, 508 S.W.2d 263, 266 (Mo. 1974) (same); fraud, see, e.g., *City Dodge, Inc. v. Gardner*, 232 Ga. 766, 768-69, 208 S.E.2d 794, 796-97 (1974) (same); and estoppel, which may be the most frequently invoked common law principle under the Code, see, e.g., *United States v. Gleaners & Farmers Coop. Elevator Co.*, 314 F. Supp. 1148, 1149 (N.D. Ind. 1970), *aff'd*, 481 F.2d 104 (7th Cir. 1973); *Multiplastics, Inc. v. Arch Indus. Inc.*, 166 Conn. 280, 285, 348 A.2d 618, 621 (1974); *Manson State Bank v. Diamond*, 227 N.W.2d 195, 200-01 (Iowa 1975); *Del Hayes & Sons, Inc. v. Mitchell*, — Minn. —, 230 N.W.2d 588 (1975) (dictum); *Central Nat'l Bank & Trust Co. v.*

One example of the use of common law when the Code is completely silent is found in *Ebasco Services, Inc. v. Pennsylvania Power & Light Co.*⁶¹ In that case PP & L, a public utility which furnished electric power to large areas of Pennsylvania, decided to increase its generating capacity by building an additional generating plant.⁶² Accordingly, it hired Ebasco Services, Inc. (Ebasco) as a contractor to undertake complete responsibility for construction of the plant.⁶³ Ebasco, in turn, gave the General Electric Company (GE) a subcontract in 1964 to supply the steam turbine generator and boiler feed pump which were to be the heart of the power plant.⁶⁴ One of the terms of the subcontract which was the subject of negotiation for three years was a limitation of GE's liability should the equipment malfunction.⁶⁵ Finally, in 1967 an agreement with such a limitation was reached.⁶⁶ Eventually the equipment did malfunction and PP & L had to spend a great deal of money purchasing replacement power from other power companies.⁶⁷ In a subsequent suit PP & L asserted

Community Bank & Trust Co., 528 P.2d 710, 713 (Okla. 1974); Sacred Heart Farmers Coop Elev. v. Johnson, — Minn. —, 232 N.W.2d 921, 923 (1975).

The list in § 1-103 of supplemental common law and equitable principles was not meant to be exhaustive, as discussed in text *supra* at note 21. Other common law rules have often been employed by courts to resolve problems when the Code is completely silent. Such common law principles include waiver, *see, e.g.*, *Kane v. American Nat'l Bank & Trust Co.*, 21 Ill. App. 3d 1046, 1051-52, 316 N.E.2d 177, 182 (1974); *Multiplastics, Inc. v. Arch Indus. Inc.*, 166 Conn. 280, 285, 348 A.2d 618, 621 (1974), and conversion, *see, e.g.*, *Yaeger & Sullivan Inc. v. Farmers Bank*, — Ind. App. —, 317 N.E.2d 792, 797 (1974).

In addition, other equitable principles have been commonly employed in Code resolution. *See, e.g.*, *In re J.V. Gleason Co.*, 452 F.2d 1219, 1222, (8th Cir. 1971) (surety's right to equitable lien and equitable subrogation in construction contract cases excepted from Article 9); *McAtee v. United States Fidelity & Guar. Co.*, 401 F. Supp. 11, 14 (N.D. Fla. 1975) ("[T]he doctrine of equitable subrogation in suretyship cases does not create a security interest under the Code and has not been displaced or controlled by Article 9."); *Kupka v. Morey*, 541 P.2d 740, 750 (Alas. 1975), (the Code's parol evidence rule held inapplicable in an action for reformation); *Urdang v. Muse*, 114 N.J. Super. 372, 380-81, 276 A.2d 397, 402 (1971) (Retail installment seller would not accept \$900 from buyer when only \$319 due in default. The court held that equity intervened so that buyer would not be required to pay the deficiency when goods were resold.) One commentator has indicated that § 1-103 is "broad enough" to make the constructive trust and equitable lien available under the Code. *Nordstrom, Restitution on Default and Article Two of the U.C.C.*, 19 VAND. L. REV. 1143, 1162 & n. 79 (1966).

Procedural questions have also been resolved by reference to outside law. *See, e.g.*, *Ziebart v. Kalenze*, 238 N.W.2d 261, 266-67 (N.D. 1975); *Bank of America v. Security Pacific Nat'l Bank*, 23 Cal. App. 3d 638, 642, 100 Cal. Reptr. 438, 441 (1972). For additional cases in which courts have invoked common law and equitable principles through § 1-103 see 1 ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 1-103 (2d ed. 1970).

⁶¹ 402 F. Supp. 421 (E.D. Pa. 1975).

⁶² *Id.* at 424.

⁶³ *Id.*

⁶⁴ *Id.* at 425.

⁶⁵ *Id.* at 426, 428-29.

⁶⁶ *Id.* GE was successful in limiting its liability for damages to the contract price. *Id.* at 429.

⁶⁷ *Id.* at 425.

that it was not bound by the contractual limitation of damages between GE and Ebasco, but rather it was a third party beneficiary of the contract reached in 1964 and as such the later limitation on GE's liability could not apply to PP & L.⁶⁸ However, since Ebasco was PP & L's agent, the court, resorting to common law agency principles, held that PP & L could not assume the status of a third party beneficiary: the parties to the contract were PP & L as principal, and General Electric.⁶⁹ The *Ebasco* court turned immediately to common law to resolve the issue without first at least examining whether any Code purpose or policies would be relevant.

In addition to those situations where the Code is completely silent with respect to a given problem, there are situations in which the Code does not explain fully or deal completely with principles which it does touch upon. In these instances courts have felt free under section 1-103 to apply common law aspects of the principles not dealt with in the Code. For example, in *Duval & Co. v. Malcom*,⁷⁰ defendant Malcom and other cotton growers offered Duval a proposed contract signed by Malcom, offering to sell their "entire crop of 1973 cotton of 729.6 acres plus any addition that may be leased prior to planting."⁷¹ Prior to this proposed contract, no oral agreement had been reached.⁷² The growers left the proposed contract with Duval who subsequently added terms to the contract which set forth an estimated yield.⁷³ Growers vehemently protested the addition to the document whereupon Duval added still more language: "Buyer will accept all of the cotton produced on the acreage regardless of whether it is more or less than the projected yield."⁷⁴ Growers again asserted that no contract existed.⁷⁵ Duval later brought suit for specific performance.⁷⁶ The court applied common law offer-acceptance analysis to determine whether a contract for the sale of cotton had been formed, even though the Code deals with principles of contract formation in sections 2-204 through 2-207.⁷⁷ The court reasoned that Duval's additions to the proposed contract were material but that section 2-207, which deals with additional terms in acceptances, was not applicable because there was no "definite and seasonable expression of acceptance" under section 2-207(1).⁷⁸ The court therefore looked to com-

⁶⁸ *Id.* at 444.

⁶⁹ *Id.*

⁷⁰ 233 Ga. 784, 214 S.E.2d 356 (1975).

⁷¹ *Id.* at 784, 214 S.E.2d at 357.

⁷² *Id.*

⁷³ Duval added to the front of the document "[p]rojected yields and farm numbers on back." On the back of the document were listed 15 farms by numbers, acreage of each and the following language: "600 pounds per acre or approximately 875 b/c [bales of cotton]." *Id.*

⁷⁴ 233 Ga. at 784, 214 S.E.2d at 357.

⁷⁵ *Id.*

⁷⁶ *Id.* at 785, 214 S.E.2d at 357.

⁷⁷ *Id.* at 784-85, 787, 214 S.E.2d at 357, 358.

⁷⁸ *Id.* at 785, 214 S.E.2d at 358.

mon law in making its determination that factual questions remained on whether a contract existed between the parties.⁷⁹

While most courts have thus resorted to the common law to supplement the Code where it is silent, the use of section 1-103 has sometimes caused confusion as a result of the absence of specific guidelines for its usage. Assuming that silence may be significant, some courts have been troubled by the use of common law where the Code is silent.⁸⁰ Relying primarily on statutory construction principles relating to the implications of silence, these courts have sometimes interpreted silence to mean that the principle, rule or exception excluded from the Code was purposefully omitted so that no gap really exists.⁸¹

⁷⁹ The court reasoned as follows: "Because [2-207] is inapplicable, we apply traditional offer-acceptance analysis and find that the 'estimate' language constituted a counter-offer because of the variation in terms." *Id.* at 787, 214 SE.2d at 358. See also J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 6 (1972) [hereinafter cited as WHITE & SUMMERS]. Another case in which a court resorted to common law contract principles was *Admiral Plastics Corp. v. Trueblood Inc.*, 436 F.2d 1335 (6th Cir. 1971), where the court found that the lack of progress in the performance of a sales contract was the result of both parties' delinquencies. The court reasoned that since the Code had no remedy for "mutual breach" the issue of whether the buyer could get his deposit back was determined by common law. *Id.* at 1338-39. Other principles which are apparently partly governed by express Code language and partly by reference to common law via § 1-103 include mitigation of damages, see, e.g., *Chicago Roller Skate Mfg. Co. v. Sokol Mfg. Co.*, 185 Neb. 515, 517-18, 177 N.W.2d 25, 26 (1970) (The court applied both Code principles and common law principles in determining the proper amount of damages in a breach of contract suit); accord, *Wurlitzer Co. v. Oliver*, 334 F. Supp. 1009, 1011-12 (W.D. Pa. 1971). See generally Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, The UCC, and the Restatement (Second) of Contracts*, 47 COLO. L. REV. 553 (1976); and assignment, see, e.g., *Centennial State Bank v. S.E.K. Const. Co.*, 518 S.W.2d 143, 147 (Mo. App. 1974) (The court used the common law principles of assignment in conjunction with § 9-504(1)(a) stating that "[T]he law of assignment remains in full force and effect as applied to the Code, since there is no provision in the Code abrogating or modifying the general law concerning assignments.")

For additional cases applying common law and equitable principles to the Code through § 1-103, see 1 ANDERSON *UNIFORM COMMERCIAL CODE* § 1-103 (2d ed. 1970).

⁸⁰ See cases cited in note 81 *infra*. The problem caused by "gaps" was anticipated by Code draftsmen: "One of the nightmares of a Code draftsmen, as of the lawyers, who will have to live with and work under his product, is that gaps will be found in it, as revealed by the presentation in controversy or litigation of a case . . ." Patterson, *The Codification of Commercial Law in the Light of Jurisprudence*, in NEW YORK LAW REVISION COMMISSION, *REPORT OF THE LAW REVISION COMMISSION FOR 1955: 1 STUDY OF THE UNIFORM COMMERCIAL CODE*, 51, 70 (1955) [hereinafter cited as Patterson].

⁸¹ See, e.g., *Investment Serv. Co. v. Martin Bros. Container & Timber Prods. Corp.*, 255 Ore. 192, 200, 465 P.2d 868, 871 (1970) ("[T]he specification of one exception [to a rule] leads to a construction of the entire statute that no other exceptions to the requirement . . . are intended."); *Seattle-First Nat'l Bank v. Oregon Pac. Indus., Inc.*, 262 Ore. 578, 580-81, 500 P.2d 1033, 1034 (1972):

One of the prime purposes of the Code was to create a statutory scheme incorporating within its provisions the complete regulation of certain types of commercial dealings. This purpose would be blunted if the rules created by some precode decisions and not expressly provided for in the statutory scheme were nevertheless grafted onto the Code by implication.

See also *Philadelphia Nat'l Bank v. Irving R. Boody Co.*, 1 U.C.C. REP. SERV. 560, 568-69 (1963) (Funk, Arb.)

When that conclusion is not rebutted, these courts have not permitted reintroduction of the principle, rule or exception through section 1-103. The decision in *Philadelphia Bond & Mortgage Co. v. Highland Crest Homes, Inc.*⁸² is illustrative of such an approach. There, the court grappled with the issue of whether an accommodation party under section 3-415 of the Code⁸³ is discharged if he requests the creditor to sue the principal debtor immediately but the creditor fails to do so.⁸⁴ The court noted that at common law a surety would be discharged in this situation.⁸⁵ The Code, however, has provided for sub-classes of sureties, including accommodation parties and guarantors, and only the latter has the right to insist that collection first be attempted from the principal debtor.⁸⁶ The court discussed whether the broader common law rule should be invoked since the Code is silent with respect to whether the accommodation party is discharged if the creditor fails to sue the debtor first.⁸⁷ The court held that the framers' intent was that only a guarantor be discharged, since the implication of setting forth such a right for the guarantor and not the accommodation party is that the Code did not intend that the accommodation party have that right.⁸⁸

⁸² — Pa. Super. Ct. —, 340 A.2d 476 (1975).

⁸³ U.C.C. § 3-415 (PA. STAT. ANN. tit. 12A § 3-415 (Purdon)) provides:

(1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

(2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

(3) As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

(4) An indorsement which shows that it is not in the chain of title is notice of its accommodation character.

(5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

⁸⁴ *Id.* at —, 340 A.2d at 497.

⁸⁵ *Id.* at —, 340 A.2d at 481.

⁸⁶ *Id.* at —, 340 A.2d at 480-81, 482. U.C.C. § 3-416(2) (PA. STAT. ANN. tit. 12A § 3-416(2) (Purdon)) provides:

(2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

⁸⁷ — Pa. Super. Ct. at —, 340 A.2d at 481.

⁸⁸ *Id.* at —, 340 A.2d at 452. *But see* First Nat'l Bank v. Hargrove, 503 S.W.2d 856 (Tex. Cir. App. 1973), which found that a statutory version of the common law doctrine supplemented the Code. *Id.* at 859. Apparently Pennsylvania has a similar statute. *See* 17 UCC REP. SERV. 159 Editor's Note, *citing* PA. STAT. ANN. tit. 8, § 21 (Purdon). On the role of prior statutes in Code construction, *see* Felsenfeld, *The Uniform Commer-*

Other courts, however, have felt justified in holding that no negative inference is established by the Code's failure to include a principle, rule or an exception. For example, in *Billingsley v. Kelly*,⁸⁹ the court faced the issue of whether a party in constructive but not actual possession of an instrument could be a "holder" under section 1-201(20).⁹⁰ That section provides: "Holder means a person who is in possession of a document of title or an instrument" The court, noting that "prudent" use by previous common law courts of the constructive delivery doctrine had worked no hardship upon commercial activities, applied the doctrine.⁹¹ The court stated that the doctrine should not be abandoned because it was: "[A]s probable to infer that the legislature intended to sustain this doctrine by not specifically negating it as it is to infer that the legislature intended to abolish the doctrine by not specifically mentioning it."⁹²

Because of the absence of clear guidelines in determining whether a rule has been expunged by Code silence, or whether outside law may be employed to supplement the Code, courts generally appear to manipulate this issue to reach results based on other grounds. In *International Harvester Credit Corp. v. American National Bank of Jacksonville*,⁹³ for example, the court held that under section 9-312(4) & (5) a creditor with an earlier perfected security interest in after-acquired property takes priority over a party with a purchase money security interest which was not perfected within 10 days after the debtor took possession of the collateral, but only to the extent of the debtor's equity in the after-acquired property.⁹⁴ Such a limitation is not set forth in the section.⁹⁵ The court's stated justification for the

cial Code and Statutory Remnants, 17 BUS. L. 309 (1962), where the author points out that although repeal by implication is not favored, it may be inferred that there was a repeal of statutes relating to the same subject matter since the Code was "intended as a unified coverage of its subject matter." *Id.* at 315-16.

⁸⁹ 261 Md. 116, 274 A.2d 113 (1970).

⁹⁰ *Id.* at 123, 274 A.2d at 117-18.

⁹¹ *Id.* at 125, 274 A.2d at 118-19.

⁹² *Id.*, 274 A.2d at 118-19. See also *In re Quantum Dev. Corp.*, 397 F. Supp. 329, 337 (D.V.I. 1975) ("[A]n enumeration by the Code of acts which constitute a conversion is not exclusive, and the general principles of law relating to the conversion of property remain in force."); *Hills Bank & Trust Co. v. Arnold Cattle Co.*, 22 Ill. App. 3d 138, 140, 316 N.E.2d 669, 671 (1974) (the omission of an Article 9 cause of action against a third party for the conversion of property upon which another holds a security interest does not preclude a common law remedy); *Salesman v. Nat'l Community Bank*, 102 N.J. Super. 482, 492-93, 246 A.2d 162, 168 (1968) (enumeration of specific acts constituting a conversion in § 3-419(1) not exclusive for a finding of conversion.).

⁹³ 296 So.2d 32 (Fla. 1974).

⁹⁴ *Id.* at 34.

⁹⁵ U.C.C. § 9-312(4) & (5) as enacted by Florida provided in part:

(4) A purchase money security interest in collateral other than inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is perfected at the time the debtor receives possession of the collateral or within ten days thereafter.

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between

holding was "constitutional requirements and equitable principles."⁹⁶ Nevertheless, the dissent stated that the holding abrogated the clear legislative intent of the Code rule,⁹⁷ and that the real reason for the decision was the majority's "aversion" to security interests in after-acquired property.⁹⁸ The great weight of authority is with the dissent.⁹⁹

Another example of a court manipulating the gap issue to reach a result apparently based on other grounds is found in *Garden City Production Credit Association v. Lannan*.¹⁰⁰ In that case a signed security agreement required the secured party's written consent to sales of collateral.¹⁰¹ The secured party commonly failed to object to sales of collateral by the debtor and applied the proceeds of the sales to the debt, but the debtor never obtained written consent to the sales from the secured party.¹⁰² Some of the collateral sold by the debtor was purchased by a buyer whose draft was accepted by the secured party but was later dishonored. The secured party then sought recovery of the collateral from defendant, a good faith purchaser of the collateral from the buyer whose draft was dishonored.¹⁰³ The secured party's theory was that under section 9-306(2), its security interest continued notwithstanding the sale,¹⁰⁴ while defendant argued that the secured party had waived the security interest even though there had been no written consent to the sale.¹⁰⁵ The court cited section 1-205(4) which

conflicting security interests in the same collateral *shall be* determined as follows:

(a) In the order of filing it both are perfected by filing, regardless of which security interest attached first . . . and whether it attached before or after filing (emphasis supplied) F.L.A. STAT. ANN. § 679.9-312.

⁹⁶ 296 So.2d at 34. Section 1-103 was not expressly invoked.

⁹⁷ 296 So.2d at 39.

⁹⁸ *Id.* at 40. The dissent pointed out that even pre-Code Florida law did not recognize the majority position and that the unspecified "Constitutional requirements" cited by the majority did not exist. *Id.*

⁹⁹ See, e.g., *North Platte State Bank v. Production Credit Ass'n*, 189 Neb. 44, 52-55, 200 N.W.2d 1, 6-7 (1972); *National Cash Register Co. v. Firestone & Co.*, 346 Mass. 255, 258, 262, 191 N.E.2d 471, 473-75 (1963). See also cases cited in Note, 26 CASE W. RES. L. REV. 708, 722 n. 70 (1976).

¹⁰⁰ 186 Neb. 668, 186 N.W.2d 99 (1971).

¹⁰¹ *Id.* at 669, 186 N.W.2d at 101.

¹⁰² *Id.* at 670, 186 N.W.2d at 101.

¹⁰³ *Id.* at 670-71, 186 N.W.2d at 101.

¹⁰⁴ U.C.C. § 9-306(2) provides: "Except where this Article otherwise provides, a security interest continues in collateral notwithstanding sale, exchange or other disposition thereof unless the disposition was authorized by the secured party in the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor." Defendant could not take free of the security interest under the exception provided in U.C.C. § 9-307(1) for buyers in the ordinary course of business because the collateral was cattle and the purchase was made from a person engaged in farming operation. Section 9-307(1) is not applicable to farm products. 186 Neb. at 675, 186 N.W.2d at 103.

¹⁰⁵ The court reframed defendant's theory as one based on "implied authorization" under § 9-306(2), but fully discussed the waiver issue in its decision. 186 Neb. at 671, 673-76, 186 N.W. 2d at 101, 102-04.

provides that express provisions of agreements control "conduct" and held that there could be no waiver.¹⁰⁶ Other courts and commentators have found that nothing in the Code displaces the law of waiver in this area.¹⁰⁷ The court's apparent motive for its decision was its belief that the waiver principle should not protect a third party as against a secured party of the debtor.¹⁰⁸

These cases suggest that courts faced with gaps in Code provisions need more specific guidelines than those provided in section 1-103 for determining when it is permissible to invoke common law.¹⁰⁹ The absence of guidance has enabled courts to pick and choose—the very antithesis of predictability. Even more disturbing, courts have often times been able to maintain their common law bias under the guise of adhering to the Code's mandate.¹¹⁰

¹⁰⁶ 186 Neb. at 675-76, 186 N.W.2d at 103-04.

¹⁰⁷ *E.g.*, *Clovis Nat'l Bank v. Thomas*, 77 N.M. 554, 563, 425 P.2d 726, 732 (1967) ("There being no particular provision of the code which displaces the law of waiver, and particularly waiver by implied acquiescence or consent the Code provisions are supplemented thereby."); *accord*, *United States v. Central Livestock Assoc.*, 349 F. Supp. 1033, 1034 (D.N.D. 1972); 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 26:11 at 715 (1965).

¹⁰⁸ The underlying reasoning of the court may be gleaned from the following statement: "It must be borne in mind that in this case we are dealing with a controversy between the lender and a third party purchaser who had no knowledge of the course of dealing between the debtor and borrower [sic]." *Garden City*, 186 Neb. at 674, 186 N.W.2d at 103. The Court apparently believed that there was no waiver of the security interest even if that principle was available as a defense: "[T]he mere failure to rebuke the seller [and] the reasonable acceptance of the proceeds of the sale when actually delivered to apply upon the debt, are not acts which indicate an intention to waive a security interest . . ." *Id.* at 675, 186 N.W.2d at 104.

¹⁰⁹ For other examples, *see, e.g.*, *Safeway Stores, Inc. v. L.D. Schreiber Cheese Co., Inc.*, 326 F. Supp. 504 (W.D. Mo. 1971). There the court stated that the damages provisions of U.C.C. §§ 2-714 and 2-715 were broad enough to include indemnification of buyer for third-party claims against buyer when the warranty of merchantability was breached. *Id.* at 509 n. 13. The court supported the proposition by referring to the common law without a full consideration of whether the Code was meant to be exclusive. *Id.* In *General Electric Supply Co. v. Epco Constructors, Inc.*, 332 F. Supp. 112 (S.D. Tex. 1971), the court carved out a common law exception to the priority scheme of Article 9. It held that a materialman's right under construction contracts to be paid from retained funds, and the surety's right to apply the funds to the completion of projects when the contractor has defaulted take priority over a party with a perfected security interest. *Id.* at 115. *Accord*, *Travelers Indemnity Co. v. Clark*, 254 So.2d 741, 745-46 (1971).

¹¹⁰ *See, e.g.*, *International Harvester*, 296 So.2d 32 (Fla. 1974), discussed in text at notes 93-99 *supra*, in which the majority agreed with the lower court's dissenting opinion, *id.* at 34, which opinion supported the position that the Code could not be deemed to have "[swept] away in one stroke of the legislative broom the jurisprudence of this State . . ." 269 So.2d 726, 732 n.3 *quoting* *Ford Motor Co. v. Pittman*, 227 So.2d 246, 249 (Fla. Dist. Ct. App. 1969). *See* Note, 26 CASE W. RES. L. REV. 708, 724 (1976). *See also* *Chaq Oil Co. v. Gardner Mach. Corp.*, 500 S.W.2d 877 (Tex. Civ. App. 1973). There the court stated that no implied warranty of merchantability attaches to the sale of used goods. The court specifically referred to § 2-314, Comment 3, which suggests that a warranty of merchantability may arise, albeit a watered-down one, but relied instead upon Texas common law. *Id.* at 878.

2. Code Terminology is Broad

Code framers purposefully drafted broadly in certain areas.¹¹¹ Concepts such as "good faith" and "unconscionability" were intentionally imprecisely defined.¹¹² Unfortunately, while the drafters intended to make the Code flexible by the use of these concepts,¹¹³ the proper role of common law in the shaping of them is not entirely clear. Such broad provisions have exacerbated the problems connected with usage of section 1-103. Rightly or wrongly, a number of courts *are* looking directly to common law when the Code terminology is broad and interpreting section 1-103 as permitting them to do so.

Among the opinions utilizing this expansive view of section 1-103 is that of *Duval & Co. v. Malcom*.¹¹⁴ In *Duval*, as noted earlier,¹¹⁵ the court found that common law offer and acceptance rules applied to the issue of whether a contract existed between the cotton growers and Duval. The court also considered whether specific performance could be granted to Duval as a result of substantially increased cotton prices, in the event a valid contract was found to exist. The court noted that under the Code, Duval's right to specific performance is explicitly governed by section 2-716(1): "[s]pecific performance may be decreed where the goods are unique or in other proper circumstances."¹¹⁶ The court indicated that "uniqueness has always been an equitable test."¹¹⁷ The court then proceeded to construe the "other proper circumstances" terminology of section 2-716, declaring: "[it is] a vague and general rule which liberally construed without proper guidelines would seem to afford specific performance for all commercial goods and turn the courts into referees in commerce. This is plainly unworkable."¹¹⁸ The court concluded that it was free to follow pre-Code law because of the unworkable language.¹¹⁹ Based on that law, the court noted that *Duval* would not be entitled to specific perfor-

¹¹¹ See Fulde, *Legislative Techniques and Problems in the Code*, 3 NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1955: 3 STUDY OF THE UNIFORM COMMERCIAL CODE 2111, 2175 (1955); Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291, 305.

¹¹² *Azevedo v. Minister*, 86 Nev. 576, 579, 471 P.2d 661, 663 (1970) ("As with all codifications, it was impossible for the Uniform Commercial Code to encompass every conceivable factual situation. Realizing this limitation, its drafters couched much of the language of the text and comments in broad generalities, leaving many problems to be answered by future litigation.") See Hawkland, *supra* note 111, at 305.

¹¹³ "This Act is drawn to provide flexibility so that . . . it will provide its own machinery for expansion of commercial practices." U.C.C. § 1-102 Comment 1. See D. King, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE*, 13 (1968).

¹¹⁴ 233 Ga. 784, 214 S.E.2d 356 (1975).

¹¹⁵ See text at notes 70-79 *supra*.

¹¹⁶ *Id.* at 788-89, 214 S.E.2d at 359.

¹¹⁷ *Id.*

¹¹⁸ *Id.* See WHITE & SUMMERS, *supra* note 79, at 191 n.77, for a construction of "other proper circumstances."

¹¹⁹ 233 Ga. at 789, 214 S.E.2d at 359, citing R. NORDSTROM, *LAW OF SALES* § 158 at 479-80 (1970).

mance as a result of the soaring prices of cotton.¹²⁰

Another example of a court relying on common law when faced with broad Code terminology is found in *Michigan National Bank v. Flowers Mobile Home Sales, Inc.*¹²¹ In that case the parties entered into a security agreement by which Flowers granted to the Bank a continuing security interest in all of Flowers' inventory, which consisted mostly of mobile homes, and in the proceeds thereof.¹²² Flowers sold a mobile home and deposited the proceeds in its checking account which contained other money.¹²³ Later, Flowers issued a check to the Bank which was subsequently dishonored because the account had been attached under execution issued on a judgment against Flowers obtained by a third party.¹²⁴ The issue before the court was whether "identifiable proceeds" in which a security interest continues under section 9-306(2) included cash proceeds which had been deposited in a regular bank account with other money.¹²⁵ Section 9-306(2) provides that when property subject to a security interest is sold by the debtor, the security interest "continues in any identifiable proceeds including collections received by the debtor."¹²⁶ The court noted initially that "[w]hile we have found no statutory definition of 'identifiable proceeds' . . . we also find no express limitation on the right of a secured party to trace proceeds This lack of limitation is not without significance."¹²⁷ It then applied tracing and trust theory, which it invoked pursuant to section 1-103, and concluded that cash proceeds were identifiable proceeds.¹²⁸

In construing broad or "unworkable" language in the Code courts adopting approaches similar to that in *Duval* and *Michigan National Bank* have too readily resorted to outside law in problem-solving.¹²⁹ This trend is disturbing because the broad lan-

¹²⁰ 233 Ga. at 788-89, 214 S.E.2d at 359.

¹²¹ 26 N.C. App. 690, 217 S.E.2d 108 (1975).

¹²² *Id.* at 691, 217 S.E.2d at 109.

¹²³ 26 N.C. App. at 692, 217 S.E.2d at 110.

¹²⁴ *Id.*

¹²⁵ *Id.* at 693, 217 S.E.2d at 110.

¹²⁶ N.C. GEN. STAT. § 25-9-306(2).

¹²⁷ 26 N.C. App. at 694, 217 S.E.2d at 111.

¹²⁸ *Id.* at 694-95, 217 S.E.2d at 111. A similar approach was used in *Universal C.I.T. Credit Corp. v. Farmers Bank*, 358 F. Supp. 317, 323-24 (E.D. Mo. 1973) (the court concluded that proceeds are "identifiable" if they can be traced in accordance with the state law governing the transactions. *Id.* at 324).

¹²⁹ Another example of a court invoking common law when Code language is broad is found in *Aldon Indus., Inc. v. Don Myers & Assoc., Inc.* 517 F.2d 188 (5th Cir. 1975). In *Aldon Indus.* the court considered a claim by buyer for consequential damages resulting from seller's delivery of defective carpeting. *Id.* at 190. Buyer had installed the carpeting in a number of school districts and argued that its ability to sell additional carpeting had been "severely impaired." *Id.* at 191. The court noted that U.C.C. § 2-714(3) states that in a "proper case" consequential damages may be recovered, but the Code does not define a "proper case" for awarding consequential damages. Citing § 1-103, the court looked to common law to determine that consequential damages were too speculative to warrant recovery. 517 F.2d at 190. U.C.C. § 2-715(2) defines consequential damages as including "any loss resulting from general

guage was designed to provide flexibility for future expansion, not an avenue for invoking old law. It would seem more appropriate to interpret overly broad language of the Code by reference to the practical needs of the commercial community as well as to the Code's basic policies, rather than to the old law.¹³⁰

3. Code Language Is Ambiguous

Although the Code drafters obviously intended Code language to be clear, they realized that in relation to some controversies the language would prove ambiguous.¹³¹ In addition, the drafters did not entirely accomplish their intended goal of using clear, simple language. For example, the Code's definition sections, drafted to avoid the need to refer to "historic meaning," are sadly deficient in terms of clarity.¹³² Thus, courts have also been confronted with the issue of whether and to what degree outside law may be utilized to *clarify* the Code.

An excellent example of unclear Code drafting is presented by the issue of whether a reclaiming seller under section 2-702(3) or a lien creditor of buyer prevails in a priority dispute. While commentators disagree as to the proper construction of section 2-702, they are in complete agreement that it is "ambiguous and confusing."¹³³ An example of the way in which the courts have responded to this confusion may be found in the third circuit's widely noted¹³⁴ *In re Kravitz* decision.¹³⁵ In *Kravitz* buyer's creditors filed an involuntary petition in

... requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover"

¹³⁰ For an example of a court adopting such an approach see *Azevedo v. Minister*, 86 Nev. 576, 471 P.2d 661 (1970). There the court recognized in determining a "reasonable time" under §§ 2-201(2) and 1-204(2) that the Code's purposes and policies must be consulted. 86 Nev. at 583-84, 471 P.2d at 666.

¹³¹ See note 6 *supra* and accompanying text.

¹³² One commentator has stated:

The Code . . . is devoid of the uniformity it prescribes for the substance of the law. The language is now clear, now mud; now grammatical now illiterate; now consistent, now inconsistent slapdash and slovenly. It wallows in definition that does not define and definition that misleads—definition for the sake of forgotten definition. It includes many ways of saying the same thing, and many ways of saying nothing.

Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L.J. 185, 185 (1967). See also Patterson, *supra* note 80, at 60.

¹³³ See *In re Federal's, Inc.*, 12 U.C.C. REP. SERV. 1142, 1444-45 (E.D. Mich. Bankr. 1973), *aff'd*, 402 F. Supp. 1357 1368 (E.D. Mich. 1975), and articles noted therein. 12 U.C.C. REP. SERV. at 1144 n.5.

¹³⁴ See, e.g., Braucher, *Reclamation of Goods from a Fraudulent Buyer*, 1 UNIFORM COMMERCIAL CODE L.J. 9 (1968); Hawkland, *The Relative Rights of Lien Creditors and Defrauded Sellers—Amending the Uniform Commercial Code to Conform to the Kravitz Case*, 67 COM. L.J. 86 (1962); Mann & Phillips, *The Reclaiming Seller and the Bankruptcy Act: A Roadmap of the Strategies*, 18 B.C. IND. & COM. L. REV. — (1977); Shanker, *Bankruptcy and Article 2 of the Uniform Commercial Code*, J. NAT'L ASS'N OF REF. IN BANKRUPTCY 37, 42-43 (1966).

¹³⁵ 278 F.2d 820 (3d Cir. 1960).

bankruptcy prior to the exercise of seller's reclamation right under section 2-702.¹³⁶ Seller then sought reclamation from the trustee in bankruptcy.¹³⁷ The court of appeals denied reclamation and set forth the following rationale as the basis for its result. Under section 2-702 a seller's right to reclaim is subject to the rights of a lien creditor.¹³⁸ Although section 2-702 nowhere explains what the rights of a lien creditor are, section 2-702 refers to section 2-403 to determine those rights.¹³⁹ Section 2-403(4) in turn refers to Article 9,¹⁴⁰ which defines a "lien creditor" as including "a trustee in bankruptcy,"¹⁴¹ but which does not explain the lien creditor's rights as against the unpaid seller.¹⁴² Failing to find the priority rights anywhere in the Code the court turned to common law. The court noted that according to Pennsylvania common law, a defrauded seller was subordinated to the rights of a lien creditor who extended credit to the buyer subsequent to the sale.¹⁴³ The court thus held that buyer's trustee in bankruptcy, as an "ideal lien creditor,"¹⁴⁴ had priority over a reclaiming seller.¹⁴⁵

Partly in reaction to the result of *In re Kravitz*, and directly in reaction to the lack of clarity in section 2-702, the Code's Permanent Editorial Board amended the Code to delete the "or lien creditor" language from section 2-702(3).¹⁴⁶ Many state legislatures have followed suit.¹⁴⁷ Where ambiguity as to the meaning of "rights of a lien creditor" still exists,¹⁴⁸ however, because of failure to amend, a more

¹³⁶ *Id.* at 821. The pertinent portions of § 2-702 as enacted in Pennsylvania stated that where a seller discovers the buyer to be insolvent he may, subject to the rights of a buyer in ordinary course "or lien creditor under this Article (Section 2-403)," and within ten days after receipt, reclaim any goods received by the buyer on credit. Pa. Stat. Ann. tit. 12A, § 2-702 (Purdon), cited in 278 F.2d at 821.

¹³⁷ 278 F.2d at 821.

¹³⁸ *Id.* See note 136 *supra*.

¹³⁹ *Id.* See note 136 *supra*.

¹⁴⁰ 278 F.2d at 821. Section 2-403(4) states: "The rights of . . . lien creditors are governed by the Articles on Secured Transactions (Article 9) . . ." PA. STAT. ANN. tit. 12A § 2-403(4) (Purdon).

¹⁴¹ 278 F.2d at 822, citing U.C.C. § 9-301(3) (PA. STAT. ANN. tit. 12A § 9-301(3) (Purdon)).

¹⁴² See 278 F.2d at 822; Braucher, *supra* note 134, at 18.

¹⁴³ 278 F.2d at 822. The court stated that "the Pennsylvania Law gives certain lien creditors a higher claim than that of a defrauded seller and that such precedent governs this case . . ." *Id.* It further indicated that "[t]he Uniform Commercial Code does not change this rule." *Id.*, citing U.C.C. § 1-103 (PA. STAT. ANN. tit. 12A § 1-103 (Purdon)).

¹⁴⁴ 278 F.2d at 822, citing § 70 of the Bankruptcy Act, 11 U.S.C. § 110(c)(1970).

¹⁴⁵ 278 F.2d at 823.

¹⁴⁶ Editorial Board Note on 1966 Amendment, 1A UNIFORM LAWS ANNOTATED § 2-702 at 349 (Master ed. 1976). In discussing its reason for the change the Editorial Board noted: "The cross-reference is confusing, since the only reference to 'rights of a lien creditor' found in Section 2-403 is a further cross-reference to Articles 6, 7 and 9 and the relevance of those Articles is not apparent." *Id.* The Editorial Board went on to discuss the *Kravitz* case and noted "[t]he result in Pennsylvania is to make the right of reclamation by this section almost illusory." *Id.*

¹⁴⁷ 1A UNIFORM LAWS ANNOTATED § 2-702 at 350 (Master Ed. 1976).

¹⁴⁸ See note 146 *supra*.

direct route for problem-solving would be to search for Code purposes and policies *before* consulting common law.¹⁴⁹

II CRITIQUE

The suggestions which will be made in this section for the usage of section 1-103 in the resolution of Code construction problems are based upon the assumption that the Code's purposes and policies should be emphasized more heavily in determining both the meaning of Code sections and the circumstances in which common law may be invoked to supplement them. This section will first outline a priority system for resolving Code construction problems. Next, this section will examine the arguments which might preclude reliance on Code purposes and policies and evaluate such arguments. The advantages of the suggested priority system will then be discussed. Finally, the priority system will be applied in the context of the various problem areas described in part I of this article.

A. *Formulating the Approach—The Role of Code Purposes and Policies*

The priority system suggested here places heavy emphasis on the Code's purposes and policies in construing Code sections with the expectation that such emphasis will promote the Code goals of uniformity and modernization. Courts are asked to look first at the explicit language of the Code, next to the Code's purposes and policies and, finally, to the common law.¹⁵⁰ Although the Code's purposes and policies should have priority over common law in problem solving, the suggestions made herein also recognize the importance of section 1-103 and do not conform to true code methodology as described earlier.¹⁵¹ Common law is needed to fill gaps unanticipated by Code drafters and to supplement the Code where the drafters purposefully

¹⁴⁹ In *In re Federal's, Inc.*, 12 UCC REP. SERV. 1142 (E.D. Mich. Bankr. 1973), *aff'd*, 402 F. Supp. 1357, (E.D. Mich. 1975), the referee in bankruptcy, noting the Code's policy of uniformity and the absence of express language referring the court to common law to resolve disputes between reclaiming sellers and lien creditors, stated that "the most plausible assumption is that the drafters intended the rights of a reclaiming seller as against a lien creditor to be determined solely by reference to the Code." *Id.* at 1146-47. The referee, however, concluded that a prior case bound him to resolving the case via common law. *Id.* at 1148, citing *In re Mel Golde Shoes, Inc.*, 403 F.2d 658, 660 (6th Cir. 1968).

Professor Hawkland suggests that a resort to analogy when the Code is unclear instead of to common law is "sounder because it recognizes that policy considerations which underlie the various code provisions are frequently transferable to analogous situations [T]o draw on the common and statutory law involves the risk of resorting to rules and principles which have become obsolete or have been defeated by competing policies." Hawkland, *supra* note 111, at 317.

¹⁵⁰ For an explanation of this priority system, see text at notes 179-235 *infra*.

¹⁵¹ See text at notes 12-15 *supra*. The specific mandate of § 1-103 and the recognition that the Code framers purposefully left some gaps for outside law supplementation, make true code methodology, in which all answers to commercial problems are found within the Code itself, an unrealistic approach.

left gaps. Common law should also be applied when the Code text is hopelessly ambiguous or overly broad and where Code purposes and policies also conflict or are vague.

Achievement of the goals of uniformity and improvement of the commercial law through greater emphasis on Code purposes and policies ultimately depends upon the extent to which the purposes and policies are readily apparent and do not themselves conflict. One valid criticism of the Code, in fact, is that Code purposes and policies are sometimes conflicting and often times overly broad.¹⁵² Given the wealth of Code purposes and policies, it has been suggested by one commentator that any solution to a problem concerning a secured transaction can find support in a policy advanced somewhere within Article 9 of the Code.¹⁵³ According to an interpretive approach which emphasizes policy, therefore, courts would effectively remain free to rely on their own diverse notions of "justice and fairness" to decide difficult Code questions.¹⁵⁴

The criticism that purposes and policies are too general to aid in construction gains most of its support from the nature of the Code's general policies—simplification, clarification, modernization, expansion and uniformity—which are set forth in section 1-102.¹⁵⁵ It is fair to say, for example, that in many situations reasonable minds will differ as to what will simplify commercial law. Yet these broad policies should not be abandoned completely in construing Code sections. Although vague and unsatisfactory when applied to some problems, oftentimes these policies will prescribe the direction which should be taken in construing a Code section. Consequently, when the broad policies are vague and unhelpful they should be ignored, but when they contribute to an understanding of a commercial problem they should be utilized.¹⁵⁶

¹⁵² See Beutel, *Interpretation, Construction, and Revision of the Commercial Code: The Presumption of Holding in Due Course*, 1966 WASH. U. L.Q. 381, 391-92 n.56; D. KING, *THE NEW CONCEPTUALISM OF THE UNIFORM COMMERCIAL CODE* 11 (1968).

¹⁵³ Beutel, *supra* note 152 at 391-92 n.56.

¹⁵⁴ *Id.* at 391. It has been noted that "[t]he mandate to interpret the Code so as to further its objective does not furnish any real guide to construction because the purposes are of 'an essentially neutral nature' and 'a great deal will depend upon the vantage point of the one contemplating the problem.'" R. ANDERSON, *ANDERSON ON THE UNIFORM COMMERCIAL CODE: CUMULATIVE SUPPLEMENT* 13 (2d ed. 1974), citing *In re Moore*, 7 UCC REP. SERV. 578, 594 (D. Me. 1969).

To the extent that this criticism is true, Code policy is no greater aid in construing the Code than general canons of construction.

¹⁵⁵ See note 2 *supra* for the text of the relevant portion of § 1-102.

¹⁵⁶ For an example of a situation where the broad policies of § 1-102 are helpful in Code construction, see note 201 & accompanying text *infra*.

Professor Hawland suggested that the U.C.C. is "sufficiently inclusive" to permit administration in accordance with its policies, Hawland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L.F. 291, 310, and that it is sufficiently broad "to prevent its policies from being defeated by requiring too much dependence on outside, relevant law." *Id.* at 311.

Professor King believed that general policies "are useful in determining and supporting some of the new conceptualism of the Code." KING, *supra* note 152, at 11, and

Of course, if the policies outlined in section 1-102 were the only Code directives available, they would probably be insufficient to answer adequately critics of the proposed priority system. For this reason, the availability of sources of Code policy other than from section 1-102 takes on vastly increased significance. Fortunately, Code policy which is less broad than that of section 1-102 does exist. For example, courts should more actively seek to determine the underlying purposes and policies of the individual sections under consideration.¹⁵⁷ Such an exercise is no more than should be done in construing any statute. Statutory construction literature is rich with references to the need to fulfill the objectives of the legislation: "[O]ne cannot interpret the language of a legal provision without considering its purpose"¹⁵⁸

Sometimes the underlying objectives of a section will be explicitly set forth in the text of the Code. These objectives can be utilized to clarify other ambiguous portions of the section. For example, section 2-708(2) permits an aggrieved seller to recover lost profits.¹⁵⁹ In *Neri v. Retail Marine Corp.*,¹⁶⁰ the court utilized 2-708(2) to award lost profits to an aggrieved seller who had an unlimited supply of standard-priced goods. This lost-volume seller, who could make sales to as many buyers as were available, was injured by buyer's failure to go through with the deal to the extent of the lost profit, the court reasoned, because buyer's breach "depletes the dealer's sales to the extent of one."¹⁶¹ The problem was the proper interpretation of the last sentence of section 2-708(2) which requires that buyer be given "due credit for . . . proceeds of resale." If the court applied the sentence literally to the lost-volume seller in *Neri*, seller would not recover anything since seller sold the goods to another buyer for the same price as negotiated with the breaching buyer. However, the court held that

that general policies in conjunction with the underlying policies of individual sections "make the . . . conceptualism practicable." *Id.* at 12.

¹⁵⁷ See King, *supra* note 152 at 11-14.

¹⁵⁸ P. BREST, NOTES FOR INSTRUCTORS USING PROCESSES OF CONSTITUTIONAL DECISIONMAKING (1976). Justice Holmes indicated that the "legislative intent" is a "residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538 (1947), citing a letter from Mr. Justice Holmes. As such, Justice Frankfurter avoided the phrase in favor of the "aim" or "policy" of the legislation, which the judge must "seek and effectuate." *Id.* at 538-39. See also Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2 (1939); P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 36-43 (1975).

¹⁵⁹ Section 2-708(2) provides:

If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit . . . which the seller would have made from full performance by the buyer, together with any incidental damages provided in this Article . . . due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

¹⁶⁰ 30 N.Y.2d 393, 285 N.E.2d 311, 334 N.Y.S.2d 165 (1972).

¹⁶¹ *Id.* at 400, 285 N.E.2d at 314, 334 N.Y.S.2d at 170.

the last sentence was inapplicable to lost-volume situations because section 2-708 "recognizes" that the lost-volume seller is injured to the extent of lost profit on one sale.¹⁶² The court's decision was clearly correct since a literal interpretation of the due-credit language would have defeated the purpose of section 2-708(2) as set forth explicitly in the section—to award lost profits to put the aggrieved party "in as good a position as performance would have done."

Legislative history may also contribute to an understanding of the objectives of individual sections. In *Neri*, for example, the court cited legislative history which indicated that the "due credit" language of section 2-708(2), was "intended to refer to 'the privilege of the seller to realize junk value when it is manifestly useless to complete the operation of manufacture'"¹⁶³

The Official Comments are an additional useful aid in determining the objectives of individual sections. Indeed, the specific purpose of the Comments as explained by Karl Llewellyn was to "display" the "organizing principle[s]" of the sections because "construction and application are intellectually impossible except with reference to *some* reason and theory of purpose and organization A patent reason . . . provides a real stimulus toward, though not an assurance of, corrective growth rather than straightjacketing of the Code by way of case-law."¹⁶⁴ Section 2-716(1), for example, provides that specific performance is available "when the goods are unique or in other proper circumstances." The purpose of the broad language is explained in Comment 1: "[t]his Article seeks to further a more liberal attitude than some courts have shown in connection with . . . specific performance." Although the Comments are not law—they have not been enacted by the state legislatures—they are commonly referred to by courts as aids in interpretation. Many courts have justifiably given the comments "substantial weight" in determining the intended application of Code sections.¹⁶⁵

¹⁶² *Id.* at 399-400, 285 N.E.2d at 314, 334 N.Y.S.2d at 169-70.

¹⁶³ *Id.* at 399 n.2, 285 N.E.2d at 314 n.2, 334 N.Y.S.2d at 169 n.2, citing Official Draft of Text and Comments of the Uniform Commercial Code, as amended by American Law Institute of the National Conference of Commissioner on Uniform Laws 14 (Supp. No. 1 1954).

The advisability of the use of legislative history in statutory construction has long been debated. See, e.g., Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930). Professors White and Summers indicate that prior drafts of text and comments are not often used in Code construction because they are not very accessible, and "reliable inference" can not be based on them. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE 10 (1972) [hereinafter cited as WHITE & SUMMERS]. Of more help, according to White and Summers are the New York Law Revision Commission Hearings, Studies and Reports. *Id.*

¹⁶⁴ WHITE & SUMMERS, *supra* note 163, at 11-12 quoting Personal Papers of Karl Llewellyn, Item J. VI 1. e. 5 (1944) (unpublished manuscript on file at the University of Chicago Law School).

¹⁶⁵ See, e.g., *In re Bristol Assoc., Inc.*, 505 F.2d 1056, 1058 n. 2 (3d Cir. 1974). See also *Fruehauf Corp. v. Yale Express Sys.* 370; F.2d 433, 437 (2d Cir. 1966). One problem with the use of Comments should be mentioned. Sometimes the Comments ap-

Beyond a more stringent effort to determine the underlying objectives of individual sections, additional aids are available in the Code for determining the meaning of the text, and these should also be utilized by courts. Reasoning by analogy to other sections of the Code, for example, often should aid in ascertaining the meaning of Code sections. The manner in which one section of the Code deals with an issue—which demonstrates the policy position of the Code on the issue—should logically be some evidence of how the Code drafters intended to treat an analogous problem in which the Code is unclear or silent. For example, section 2-610(a) permits an aggrieved party after anticipatory repudiation to await performance “for a commercially reasonable time.” The section is silent with respect to the measurement of a commercially reasonable time and the effect if the aggrieved party waits too long. It has been effectively argued that the solutions to these questions should be derived by analogizing to section 2-712—buyer’s “cover” provision.¹⁶⁶ That section permits an aggrieved buyer to purchase substitute goods, but only if done without unreasonable delay, and appears to permit buyer to wait at least long enough “to look around and decide as to how he may best effect cover.”¹⁶⁷ Thus, under section 2-610 the aggrieved party should be permitted to await performance while he decides how best to cover or resell, but if he waits too long he should be precluded from those remedies.

Courts can also “find” purposes and policies of the Code expressly stated in a great many Code sections. Some sections are basically policy statements and nothing more. For example, section 1-106 tells us that remedies are to be liberally administered, section 1-203 requires good faith in the performance of contracts and section 2-302 permits the courts to refuse to enforce unconscionable contracts. Many other sections evidence the intent of the drafters to “deformalize” the Code.¹⁶⁸ For example, section 2-204(1) provides that a sales contract “may be made in any manner sufficient to show agreement,” avoiding the need for a technical “offer” and “acceptance.” As policy statements, these sections are helpful in construing unclear sections of the Code.

From the foregoing discussion it is apparent that a wide variety of approaches are open to courts through which to determine the meaning of a Code section under consideration. Given this abundance of approaches, the priority system suggested above, which emphasizes judicial attentiveness to the Code’s purposes and policies in determining the meaning of Code sections, should not be displaced by criticism

pear to go beyond the express language of the text, and sometimes they restrict it. WHITE & SUMMERS, *supra* note 163, at 12. See Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 621-30. Courts should be mindful that the Comments should be utilized only to determine the objectives of the text itself.

¹⁶⁶ See WHITE & SUMMERS, *supra* note 163, at 264.

¹⁶⁷ U.C.C. § 2-712, Comment 2.

¹⁶⁸ WHITE & SUMMERS, *supra* note 163 at 15.

whose narrow focus is simply directed at the overbreadth of section 1-102 as a construction guide.

One other argument possibly stands in the way of the implementation of the suggested priority system. According to Comment 1 to section 1-103, common law principles are of continued vitality "except insofar as they are *explicitly* displaced by this Act."¹⁶⁹ This language could be interpreted as precluding the priority system which sets Code purposes and policies above common law. However, there are a number of arguments which rebut such an interpretation of the Comment. First, it may be contended that since the common law is displaced by particular provisions of the Code, it is displaced by section 1-102(1), which requires liberal construction to promote the Code's "underlying purposes and policies."¹⁷⁰ It would seem then, that on its face the Code mandates that purposes and policies take precedence over common law.¹⁷¹ Second, the Code's "legislative history,"¹⁷² suggests that section 1-103 was intended to be a narrow outlet to common law. Section 1-103 in the May, 1949 through 1953 drafts contained an additional comment emphasizing the role of equitable principles:

In general this Act recognizes and furthers the application of equitable principles to commercial transactions. It is intended, subject to commercial standards, to reintroduce the general use of equitable principles into the law governing commercial transactions. Thus this Act considers "equity" in all of its aspects as an inherent part of "the law" in commercial cases. This major policy is intended to operate throughout even though no explicit mention of equitable principles is made in particular sections.¹⁷³

¹⁶⁹ emphasis added.

¹⁷⁰ See U.C.C. § 1-102(1) & Comment 1. See also text accompanying note 43 *supra*; KING, *supra* note 152, at 12-13. Section 1-102, Comment 1 refers with approval to decisions which have "disregarded a statutory limitation of remedy where the reason of the limitation did not apply."

¹⁷¹ See Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROB. 330, 338 (1951). By emphasizing the displacement language in § 1-103, Franklin, in fact, has suggested that "the mission" of § 1-103 is "to establish the general, actual and potential hegemony of the UCC in relation to the civil [common] law." *Id.* at 339. Another commentator has indicated that "[a]lthough American lawyers have not paid much attention to sections 1-103 and 1-104, civilians assign the highest importance to these sections and find in them the final proof that the Uniform Commercial Code is a 'code' in the Romanist sense." Hawkland, *supra* note 156, at 313. In addition, at least one state's Official Comments have indicated that courts consider § 1-102 first: "[section 1-103] . . . is not as broad as would first appear. It must be read in the light of the five purposes and policies which, under § 1-102, the interpretation of the Code must promote." MASS. GEN. LAWS ANN. ch. 106, § 1-103 (Mass. Code Comment).

¹⁷² The term "legislative history" as used in this article refers to prior drafts and prior official texts of the Uniform Commercial Code, as distinguished from the immediate legislative history behind particular state enactments. See generally WHITE & SUMMERS, *supra* note 163, at 9-11.

¹⁷³ U.C.C. § 1-103, Comment 3 (1952 version).

This comment, however, does not appear in the final Official Text, thus suggesting that the framers decided against a heavy emphasis on finding equitable principles outside of the Code.¹⁷⁴ Finally, it simply does not logically follow that merely because the Code makes reference to the use of outside law to supplement the Code, that the Code's objectives—its purposes and policies—may be abandoned and replaced by such law. Nor should canons of construction be substituted for the purposes and policies of the Code in determining the meaning of Code language. For example, the canon that a statute expressly mentioning one exception to a principle is presumed to have excluded other unmentioned exceptions¹⁷⁵ is no more than an attempt to ascertain the meaning of the statute. It is submitted that purposes and policies, whether explicit or underlying, are superior evidence of that meaning.

Thus it has been shown that neither the argument that the Code purposes and policies are too broad and conflicting for the suggested methodology, nor the argument that section 1-103 precludes a system which gives purposes and policies priority over common law, is fatal to implementation of the methodology. Moreover, there are advantages to this priority system which suggest that it should be followed.

The lesson to be learned from prior attempts at codification is that uniformity of commercial law is not possible if courts unhesitatingly invoke common law in construing such legislation.¹⁷⁶ As one commentator has pointed out, "free resort to outside law . . . not only makes possible the utilization of different analogies, but brings into play different rules of law and social policies, inevitably reducing the chances of uniform results."¹⁷⁷ While it is unrealistic to suggest that courts inevitably will reach uniform results by emphasizing Code purposes and policies in construing Code sections, such an approach should reduce inconsistency. Similarly, a greater role for Code purposes and policies should prove a more effective restraint on courts seeking to reintroduce old complex rules which the Code has attempted to simplify and modernize. The attempted improvement of commercial law as embodied in the Code cannot succeed if its reforms are ignored in favor of common law approaches. Therefore, when problems in construction exist, courts should make a good faith effort to find the Code mandate within the Code.¹⁷⁸ It is submitted that such

¹⁷⁴ But see WHITE & SUMMERS, *supra* note 163, at 10, and note 163 *supra*.

¹⁷⁵ See *Investment Serv. Co. v. Martin Bros. Container & Timber Prods. Corp.*, 255 Ore. 192, 200, 465 P.2d 868, 871 (1970).

¹⁷⁶ See note 7 *supra*.

¹⁷⁷ Hawkland, *supra* note 156, at 314.

¹⁷⁸ Some courts have recognized that uniformity and certainty demand that Code policies take precedence in deciding cases. See *In re Hardin*, 8 UCC REP. SERV. 857, 861-62 (E.D. Wis. 1971), *aff'd sub. nom.* *Shapiro v. Union Bank & Savings Co.*, 458 F.2d 938, 940 (7th Cir. 1972); *Lincoln Bank & Trust Co. v. Queenan*, 344 S.W.2d 383, 385 (Ky. Ct. App. 1961).

an emphasis, which would promote a more thorough examination of Code purposes and policies by the courts—with a concomitant reduction in judicial resort to the common law—would significantly help to achieve increased uniformity and improvement of commercial law.

Up to this point, this critique has attempted to demonstrate generally that courts should make a greater effort to utilize the Code's purposes and policies in problem solving before invoking common law. While some of what has been said may seem obvious, it must be remembered that in a great number of cases, courts have simply failed to consider whether a decision more in harmony with the goals of uniformity and modernization could be rendered by investigating Code purposes and policies rather than resorting to common law. The following sub-section of the critique will suggest more specifically how Code purposes and policies and common law can best be utilized together within the priority system of express language, purposes and policies, and common law, to promote uniformity and the improvements set forth in the Code.

B. *Methodology Under the Priority System*

1. Methodology When Code Language Is Clear¹⁷⁹

When Code language is clear and consistent with its overall purposes and policies, the court's mandate obviously is to apply the Code rule rather than outside law.¹⁸⁰ It is less clear, however, what role, if any, section 1-103 should play when express Code language and Code purposes and policies conflict. As mentioned earlier, in recognition of the Code mandate to interpret language liberally, some courts have refused to apply technical language which would conflict with Code policies.¹⁸¹ Should a court apply common law which is more consistent with a purpose or policy of the Code than express language? For example, in the bulk sales problem¹⁸² the express language of section 6-104(3) that a transfer is not ineffective by reason of errors or omissions in the list of the transferor's creditors unless the transferee had (actual) knowledge of the errors or omissions, conflicts with the primary Code policy of Article 6—protecting creditors of the transferor from fraud.¹⁸³ The common law rule requiring "careful inquiry" by

¹⁷⁹ Determining the "plain meaning" of the Code is often difficult. On the difficulties of construction generally, see Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 528-29 (1947). Although there are infinite gradations in the clarity of statutes, at least some sections of the Code are clear enough for the courts to apply without resort to additional statutory construction techniques. Others, of course, are not. The problem focused upon here is the proper role of § 1-103 when there is adequate Code language.

¹⁸⁰ The language of § 1-103 certainly means at least that. Failure to apply the plain meaning would defeat at least two of the goals of codification—certainty and uniformity.

¹⁸¹ See notes 43-46 & accompanying text *supra*.

¹⁸² See text at notes 47-55 *supra*.

¹⁸³ See note 53 & accompanying text *supra*.

the transferee as to the accuracy of the list of creditors prepared by the transferor is more consistent with that policy. Should the court then apply section 6-104(3) literally or should the court apply the common law rule?

Where the common law rule will further Code objectives perhaps it should defeat technical applications which may lead to unjust results. Nevertheless, a court willing to go that far must be mindful of the fact that common law may be employed in the face of technical language if, but only if, the logic of the common law is clearly consistent with purposes and policies of the Code, while the technical language of an express section is clearly inconsistent. To the extent that uniformity will be sacrificed under this system, the fault lies with Code drafting, not with judicial reluctance to apply the Code. Sections of the Code which are ignored in favor of common law which is more consistent with the Code's overall approach should be redrafted forthwith.¹⁸⁴

2. Methodology When the Plain Meaning of the Code is Difficult to Determine

a. Code Silence. The grounds for determining whether silence is intended to exclude a common law or equitable principles are vague and often contradictory. When some aspects of a common law principle are included in a section, it is usually not clear whether other aspects of the rule are meant to be excluded.¹⁸⁵ In addition, if a common law principle is expressly included in a section it is equally unclear whether that means that the principle is excluded from other sections within the same chapter or article which do not expressly include it.¹⁸⁶ The limited utility of the rules of statutory construction in general,¹⁸⁷ and, in particular, the futility of attempting to extract

¹⁸⁴ Cf. notes 133-49 & accompanying text *supra*.

¹⁸⁵ For example, the remedies system of Article 2 sets forth in great detail the respective rights of seller and buyer upon breach by the other. Little emphasis is placed on the common law principle of restitution, and the common law avoidable consequences rule is not neatly set out in any one section. It is not clear whether the comprehensiveness of the remedies system suggests that these concepts are excluded except where specifically mentioned, or whether, instead, the absence of specific references to these remedies principles suggest that they may be invoked to supplement the Code. See notes 286-307 & accompanying text *infra*. Similarly it is not clear whether the definition of "holder" in § 1-202(20) excludes the concept of constructive possession or whether the section's silence on the issue suggests that common law constructive possession may in appropriate circumstances supplement the section. Compare *Billingsley v. Kelly*, 261 Md. 116, 125, 274 A.2d 113, 118-19 (1971), recognizing constructive possession on the basis that it was "long-established" law, and because the statutory construction grounds were "vague and neutral" with *Investment Serv. Co. v. Martin Bros. Container & Timber Prod. Corp.*, 255 Ore. 192, 200-01, 465 P.2d 868, 871-72 (1970), suggesting that constructive possession may have been eliminated from the Code.

¹⁸⁶ See *Philadelphia Nat'l Bank v. Irving R. Boody Co.*, 1 UCC REP. SERV. 560, 568 (Funk Arb. 1963).

¹⁸⁷ See, e.g., *Frankfurter*, *supra* note 179 at 544. It has been noted that for every rule of construction its opposite can be found. *Llewellyn, Remarks on the Theory of Appel-*

meaning from the implications of silence, suggest that courts should eliminate the exercise from problem-solving.

In determining whether there is a gap, the express language of the Code must be consulted first. Some Code sections are sufficiently well-worded and consistent with Code purposes and policies so that it will be clear that the common law rule does not supplement the section even though the principle is not already included or specifically excluded. For example, as noted earlier, the express language of section 2-207,¹⁸⁸ although difficult to deal with in many respects,¹⁸⁹ makes it clear that the common law principle that an acceptance must be the mirror image of the offer is eliminated from Code jurisprudence except when "acceptance is expressly made conditional on assent to the additional or different terms."¹⁹⁰ Permitting common law to "supplement" this and similar sections with a contrary rule would destroy the meaning of many of them.

Still, the Code contains many provisions in which it is not readily ascertainable from the express language whether common law supplements the Code. Few statutes, in fact, are so plain that litigants cannot find different ways of construing them.¹⁹¹ Yet, instead of resorting to vague canons of construction involving the implications of silence to determine whether there is a gap, it may be more profitable and more compatible with the direction of section 1-102 for courts to make a more thorough examination of Code purposes and policies to determine their relationship to the proposed common law supplementation: (1) When specific Code purposes and policies support or do not conflict with the proposed common law principle, courts should presume that the Code intends to incorporate the principle. (2) When Code purposes and policies which appear to apply to the problem themselves conflict or are hopelessly vague, the purposes and policies should not be employed as a device for determining whether there is a gap. Since neither express language nor purposes and policies clearly demonstrate that common law was displaced, courts should conclude that the common law principle does supplement the Code. (3) When the common law rule conflicts with clearly defined Code

late Decision and the Rules or Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395, 401-06 (1950).

¹⁸⁸ See note 34 & accompanying text *supra*.

¹⁸⁹ See WHITE & SUMMERS, *supra* note 163, at 23-33.

¹⁹⁰ Section 2-207(1) provides in full:

Additional Terms in Acceptance or Confirmation—(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

In determining whether the express language demonstrates that there is no gap to fill, other statutory construction techniques such as an examination of legislative history could, of course, be employed.

¹⁹¹ de Sloovere, *Textual Interpretation of Statutes*, 11 N.Y.U. L.Q. 538, 548-49 (1934).

purposes and policies which apply to the problem, the common law rule should not supplement the Code. The conflicting purposes and policies of the Code would demonstrate that the common law principle was purposefully displaced—that is, there is no gap.

In summary, where the plain meaning of the Code is difficult to determine due to legislative silence, a court should first determine whether the text itself indicates any position with respect to the common law rule. If it does, that direction ordinarily should be followed.¹⁹² If the Code language does not appear to take any position with respect to whether a common law rule supplements the Code, a presumption should arise that the rule supplements the Code. That presumption could be rebutted by demonstrating that clear Code policy on the point conflicts with the common law.¹⁹³

This priority system for filling gaps where the Code is silent is not in harmony with a strict construction of either section 1-103 or with the true code methodology of section 1-102. Under section 1-103, common law should be employed unless "displaced by the particular provisions of this Act." Comment 1 indicates that common law must be "explicitly" displaced. Taken together, the section and comment suggest that policy extrapolated by analogy, from Code comments or from legislative history would not displace common law. The approach suggested here, however, would require ignoring common law which conflicts with such Code policy. Moreover, true code methodology requires gap filling by resort to purposes and policies with no reference to common law, while the suggested three tier priority developed here permits common law to be invoked unless there is a specific countervailing policy. The two sections are both part of the Code and must be read together; the suggestions here may be most consistent with the Code's main purpose of uniform development, with least damage to the sections' individual mandates.

How should cases involving Code silence be decided under this system? A reexamination of some of the cases discussed at the outset of this article is sufficient here for illustrative purposes. For example, in *International Harvester Credit Corp.*,¹⁹⁴ the majority opinion did not

¹⁹² Occasionally, the common law proponent may succeed in demonstrating that purposes and policies of the Code are consistent with the common law and inconsistent with a technical reading of the Code text. Query whether under these circumstances, the common law should be employed. See text at notes 181-84 *supra*.

¹⁹³ To illustrate, at common law when buyer breached a contract for the sale of goods, in some instances the available restitutionary remedy would put the seller in a better position than if there had been no breach. See example cited in text at notes 298-300 *infra*. Should this restitutionary rule be available under the Code remedies system, which does not specifically mention it? The Code's policy on remedies is to put the injured party in as good a position as if there had been no breach not a better one. See U.C.C. § 1-106. The Code's purposes and policies therefore conflict with this common law rule and suggest that restitution should not be available under the Code, at least to the extent that it puts the aggrieved party in a better position than if there had been no breach. For a more complete analysis of this problem see part III commencing at note 236 of the text *infra*.

¹⁹⁴ 296 So.2d 32 (Fla. 1974). See notes 93-99 & accompanying text *supra*.

explain the constitutional and equitable principles it invoked in deciding that the priority of the after-acquired property security interest is limited to the debtor's equity. It simply concluded that permitting a party with a security interest in after-acquired property to prevail over a party with a purchase money security interest which was not perfected within 10 days, would be "an invidious preference" and "arbitrary."¹⁹⁵ The dissent persuasively pointed out, however, that there really were no "constitutional provision[s] which [prohibit] the Legislature from giving priority to one valid security interest . . . over another"¹⁹⁶ Such provisions if they existed, the dissent stated, would necessitate the invalidation of the real property recording statutes.¹⁹⁷ The dissent also demonstrated that giving priority to the security interest in after-acquired property was not inequitable since the purchase money security interest could have been filed within 10 days, giving it priority, and that any priority to a creditor is in a sense inequitable when the assets of the debtor are insufficient to satisfy both debts.¹⁹⁸ Furthermore, the dissent argued that section 9-312(5) is clear and explicit as to the priority result.¹⁹⁹ Since there probably was no gap, the majority erred in invoking outside law at all.

Even if the express text of the Code were silent on whether the priority of the after-acquired property interest should be limited to the debtor's equity, Code purposes and policies clearly demonstrate that the after-acquired property security interest should *not* be so limited. First, the concept of title is irrelevant under Article 9 and the debtor acquires not an "interest" in the property but the property itself.²⁰⁰ Second, the priority system of Article 9 is generally based on a

¹⁹⁵ 296 So.2d at 34.

¹⁹⁶ *Id.* at 40.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ The dissent quoted from § 9-312(5), FLA. STAT. § 679.312:

(5) In all cases not governed by other rules stated in this section (*including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section*), priority between conflicting security in the same collateral *shall be determined as follows:*

(a) in the order of filing if both are perfected by filing, regardless of which security interest attached first . . . and whether it attached before or after filing; 296 So.2d at 42 (emphasis supplied).

Section 9-312(5) nowhere mentions any qualification for security interests in after-acquired property, which are expressly provided for in §§ 9-108 and 9-204. *International Harvester* is noted in Note, 26 CASE W. RES. L. REV. 708 (1976). The author of that Note argues that additional evidence that there is no exception in 9-321(5) as prescribed by the majority is that other limitations are included in that section so that "the absence of any limitation on the after-acquired property interest's priority is intentional." *Id.* at 722. However, the methodological approach suggested herein would discount such statutory construction techniques, but would reach the same result as the Note on other grounds. See notes 200-01 & accompanying text *infra*.

²⁰⁰ 296 So.2d at 41 (dissenting opinion). See U.C.C. § 9-202: "Each provision of this Article with regard to rights, obligations and remedies applies whether title to col-

notice system—one who takes a security interest in property with notice of a prior perfected security interest in the property has second priority. The majority's result conflicts with a notice system since the purchase money secured creditor had notice of the prior security interest. Third, the general Code policy of simplicity and clarity mandates that the priority system of section 9-312(4) and (5) be followed without a judicially carved resurrection of concepts expunged by the Code.²⁰¹ Under the priority system suggested in this Article for filling gaps, therefore, the after-acquired property security interest would not be limited to the debtor's equity.

Application of the suggested priority system reveals similar flaws in the court's conclusion that there could be no common law waiver in *Garden City Products*.²⁰² In that case, it will be recalled, the secured party failed to object to the sale of collateral and credited the debtor's account with the proceeds.²⁰³ Under the suggested priority system, it is submitted that the common law waiver principle should have been applied. The express language of section 1-205 provides that "express provisions of agreements control course of dealing and usage of trade" but is silent as to whether common law waiver supplements the section.²⁰⁴ Code purposes and policies apparently do not conflict with applying the waiver principle. Rather, they seem to support applying it, since the Code generally has attempted to promote good faith and fair dealing.²⁰⁵ A result which permits the secured party to regain the collateral from an innocent purchaser under the circumstances present in *Garden City Products* would sanction misleading conduct and bad faith. Thus, the court was probably incorrect in concluding that there could be no common law waiver.

lateral is in the secured party or in the debtor." See also U.C.C. § 1-201 (37); Note, 26 CASE W. RES. L. REV. 708, 725 (1976).

²⁰¹ The dissent elaborates on these policies:

Since the success of the Code is based on its simplicity and its certainty, courts should make every effort to interpret its provisions simply, literally, and absolutely. By creating judicial exceptions, changing definitions, and interpreting the Code extremely broadly, we will eventually reproduce the morass of confused commercial law the Code was designed to correct. In this particular case, I feel we are going out of our way to do just that, because the Code provisions involved are not in the least ambiguous.

296 So.2d at 45.

²⁰² 186 Neb. 668, 186 N.W2d 99 (1971).

²⁰³ *Id.* at 670, 186 So.2d at 101. See notes 100-06 & accompanying text *supra* for a discussion of the case.

²⁰⁴ U.C.C. § 1-205(4) states:

The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consistent with each other; but when such construction is unreasonable express terms control both course of dealing and usage of trade and course of dealing controls usage of trade.

²⁰⁵ See, e.g., U.C.C. § 1-203.

One important policy of the Code is the general requirement of integrity in conducting transactions. See *Skeels v. Universal CIT Credit Corp.*, 335 F.2d 846, 851 (3d Cir. 1964).

One well-reasoned opinion is more representative of how courts *should* proceed under the suggested system. In *Franklin National Bank v. Eurez Construction Corp.*,²⁰⁶ the court confronted section 3-408 which provides that failure of consideration "is a defense against any person not having the rights of a holder in due course."²⁰⁷ The *Franklin* court considered whether an exception to the section may be inferred so that an accommodation party who received no consideration *would* be liable on a dishonored note to a taker bank, which did not have the rights of a holder in due course.²⁰⁸ Under section 3-415(2) an accommodation party is liable when an instrument has been taken for value before due "even though the taker knows of the accommodation," but the section says nothing about the consideration issue. The court noted that a logical reading of section 3-415, the section's comments, and related sections indicated as a matter of policy that the drafters did *not* intend to abrogate the common law rule which provided an exception to the failure of consideration defense.²⁰⁹ Among other things, the court cited section 3-415, Comment 3, which states that "[t]he obligation of the accommodation party is supported by any consideration for which the instrument is taken before it is due."²¹⁰ On the basis of that comment and legislative history, which suggested "that the draftsmen intended the taker's right to enforce an instrument against an accommodation party to turn on whether the taker had given value, rather than on whether the accommodation party had received consideration,"²¹¹ the court held that "there is no want of consideration within the meaning of section 3-408 when consideration moves before maturity to the party accommodated, even though the accommodation maker receives no consideration for executing the instrument."²¹² The court also noted that the Code policy directing liberal construction to promote uniformity supported its result.²¹³ Since other courts had already construed section 3-408 to contain the common law exception, the court felt that for the sake of uniformity it should do so also.²¹⁴

It would seem, then, that cases which invoke common law only when the Code is silent and the common law is not in conflict with

²⁰⁶ 60 Misc. 2d 499, 301 N.Y.S.2d 845 (Sup. Ct. 1969).

²⁰⁷ *Id.* at 501, 301 N.Y.S.2d at 848.

²⁰⁸ *Id.* at 502, 301 N.Y.S. 2d at 848.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 504, 301 N.Y.S.2d at 849-50.

²¹¹ *Id.* at 504, 301 N.Y.S.2d at 850.

²¹² *Id.*

²¹³ *Id.* at 505, 301 N.Y.S.2d at 851.

²¹⁴ *Id.* For other cases which at least to some extent emphasize the code's purposes and policies in gap filling see *Seattle-First Nat'l Bank v. Oregon Pac. Indus., Inc.*, 262 Ore. 578, 580-81, 500 P.2d 1033, 1034 (1972); *In re Robertson*, 6 UCC REP. SERV. 266, 269 (E.D. Tenn. 1969). See also *In re Hardin*, 8 UCC REP. SERV. 857, 861 (E.D. Wisc. 1971), *aff'd*, 458 F.2d 938, 940 (7th Cir. 1972); *Dairymen's Coop. Creamery Ass'n v. Leopold*, 34 Cal. App. 3d 184, 188, 109 Cal. Rptr. 753, 756 (1973). See generally 3 R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 1.01 (1976).

Code purposes and policies probably reflect what the Code framers intended as the proper use of section 1-103.²¹⁵ Regrettably, many courts have found it difficult to determine whether a gap exists so that common law may be invoked, and consequently often make decisions on the gap issue on other grounds. Few cases have applied common law only after expressly determining whether Code purposes and policies conflict with the common law.²¹⁶ Accordingly, many decisions invoke common law rules which conflict with Code purposes and policies.²¹⁷ By relying on common law these decisions undermine the Code's effectiveness as a unifier of commercial law and impede achieving the Code's modernization objective.

²¹⁵ See Patterson, *The Codification of Commercial Law in the Light of Jurisprudence*, in NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1955: 1 STUDY OF THE UNIFORM COMMERCIAL CODE 41, 69 (1955). The author foresaw a mixed regime of Code and case law. Even some proponents of true code methodology have sanctioned some use of common law:

[T]he device which permits a resort to be made to outside law is [not] necessarily fatal to the construction of a true code. The use of outside law militates against the code concept only when it relegates the code to a supplemental position. So long as an act provides the general law, to be supplemented by external rules, it can rise to the level of a code.

Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291, 312.

²¹⁶ In *Stewart-Decatur Sec. Sys., Inc. v. Von Weise Gear Co.*, 517 F.2d 1136, 1139-40 (5th Cir. 1975), buyer, after inspecting a prototype gear motor it had requested from seller, sent a purchase order to seller referring to the prototype, but which specified a different input speed than the prototype. *Id.* at 1137. Buyer was unaware that the input speed specified in the purchase order was different from the prototype at the time the order was sent. *Id.* Seller returned an order acknowledgment which referred to the prototype by number, did not mention input speed, and approved the sale. *Id.* Seller delivered gear motors with the input speed of the prototype which proved unsatisfactory to buyer. *Id.* at 1138. The court held that a contract was created for gear motors of the input speed of the prototype since buyer thought the prototype it had seen was satisfactory and therefore intended to purchase it, even though buyer's purchase order had specified a different input speed. *Id.* at 1139-40. In reaching its result, the court referred to the common law rule that the parties' construction of the contract should be adopted. *Id.* The court also noted in a footnote that Code purposes and policies reinforce the intention of the parties in contract formation. *Id.* at 1140 n.11. Thus the reference to common law was probably not in error, although it is regrettable that the Code policy discussion was buried in a footnote. Courts should emphasize the purposes and policies of the Code in conjunction with the common law discussion. Otherwise, in cases where common law and purposes and policies conflict, the latter may be overlooked and common law applied.

²¹⁷ See *e.g.*, notes 31-40 & accompanying text *supra*. But see *Seattle-First Nat'l Bank v. Oregon Pac. Indus., Inc.*, 262 Ore. 578, 581, 500 P.2d 1033, 1034 (1972) (purpose of Code "blunted" if rules of common law used in Code analysis.)

If the specific section at issue provides expressly that the court should look to common law, a resort to Code principles and policies first may not be necessary. See *Ampex Corp. v. Appel Media, Inc.*, 374 F. Supp. 1114, 1118, (W.D. Pa. 1974) (section 3-601(2) states that a party may be discharged by act or agreement which would discharge a simple contract for the payment of money). An official comment suggesting that common law may be invoked may also be sufficient to bypass Code purposes and policies as a source of law. See, *e.g.*, *McRae v. Vogler*, — Ore. —, 536 P.2d 509, 511 & n.4 (1975) (comment to § 9-207 states that § 9-207(2) "states rules which follow common law precedents").

b. *Methodology When Code Terminology is Broad.* How should the courts respond to intentionally broad Code drafting? It has been demonstrated that to some extent their response has been to use section 1-103 in order to find common law and equitable rules to explain Code sections. In each of the two major cases discussed in Section I(B)(2),²¹⁸ the court's decision was based primarily on outside law. In *Duval & Co. v. Malcom*,²¹⁹ the court referred to pre-Code law to determine whether buyer was entitled to specific performance,²²⁰ and in *Michigan National Bank*²²¹ the court interpreted the term "identifiable proceeds" by resorting to old law."²²²

In each case the court failed to consider, or at least place proper emphasis on, Code purposes and policies which may have mandated different results.²²³ In *Duval & Co. v. Malcom*, in determining whether specific performance of a contract for the sale of cotton was available to buyer, the court cited pre-Code law to the effect that equity will not grant specific performance of contracts for the sale of commodities even though "the subject matter of the contract is essential to the carrying on of the complainant's business,"²²⁴ and that unreasonable prices in the marketplace do not make the subject matter of the contract unobtainable elsewhere.²²⁵ The court ignored more liberal Code policy found in the comments to section 2-716:

[T]his Article seeks to further a more liberal attitude than some courts have shown in connection with . . . specific performance The test of uniqueness under this section must be made in terms of the total situation which characterizes the contract [U]niqueness is not the sole basis of remedy under this section for the relief may also be granted "in other proper circumstances," and inability to cover is strong evidence of other proper circumstances."²²⁶

Since a seller may be excused from performance of a contract under

²¹⁸ *Duval & Co. v. Malcom*, 233 Ga. 784, 214 S.E.2d 356 (1975); *Michigan Nat'l Bank v. Flowers Mobile Home Sales, Inc.*, 26 N.C. App. 690, 217 S.E.2d 108 (1975). See text at notes 114-28 *supra*.

²¹⁹ 233 Ga. 784, 214 S.E.2d 356 (1975).

²²⁰ *Id.* at 788-89, 214 S.E.2d at 359. See text at notes 114-20 for a discussion of the case.

²²¹ 26 N.C. App. 690, 217 S.E.2d 108 (1975); see notes 121-28 & accompanying text *supra* for a discussion of the case.

²²² 26 N.C. App. at 694, 217 S.E.2d at 111.

²²³ In *Michigan National Bank* the court did take a limited look at Code sections to get a sense of "the spirit in which the Uniform Commercial Code is to be applied," before it turned to common law to resolve the issue. 26 N.C. App. at 693, 217 S.E.2d at 111.

²²⁴ 233 Ga. at 788-89, 214 S.E.2d at 359, quoting 71 AM. JUR. 2d 204 § 157 (1973).

²²⁵ 233 Ga. at 788, 214 S.E.2d at 359.

²²⁶ U.C.C. § 2-716, Comments 1 & 2. For cases applying the "other proper circumstances" language of § 2-716 see *Schweber v. Rallye Motors, Inc.* 11 UCC REP. SERV. 1154, 1156 (N.Y. Sup. Ct. 1973); see also *R.N. Kelly Cotton Merchant, Inc. v. York*, 379 F. Supp. 1075, 1079 (M.D. Ga. 1973), *aff'd* 494 F.2d 41, 42 (5th Cir. 1974) (granting specific performance by reference to Code sections other than § 2-716).

section 2-615 as a result of increased cost "due to some unforeseen contingency . . . [such as] a severe shortage of raw materials or of supplies due to . . . local crop failure,"²²⁷ then it would seem that under similar circumstances, i.e., due to the unforeseen contingency of skyrocketing costs of the commodity on the market resulting from its scarcity, perhaps a buyer should be granted specific performance on the theory of inability to cover pursuant to section 2-716.²²⁸

In *Michigan National Bank* the Court also failed to place proper emphasis on Code purposes and policies. There, after a brief discussion of the Code,²²⁹ the court applied common law tracing and trust theory to determine whether cash proceeds in a bank account with other money were identifiable proceeds under section 9-306(2). Concluding that such cash proceeds were identifiable,²³⁰ the court then implied that its conclusion was in harmony with section 1-102(2) in that it would "simplify . . . the law governing commercial transactions."²³¹ The court appears to contradict itself, however, by also noting that had the secured party insisted that its debtor maintain a separate bank account for the proceeds of the collateral, "the problem of tracing 'identifiable proceeds' would have been greatly simplified."²³² The court should have considered whether a holding that assets in a bank account with other money are not "identifiable proceeds," which

²²⁷ U.C.C. § 2-615, Comment 4.

²²⁸ Permitting specific performance under § 2-716 when the price of goods skyrockets on the open market sometimes may conflict with § 2-615 which may excuse seller from performing for the very same reason. Nevertheless, a more liberal approach to specific performance which should be taken under § 2-716 should permit an award of specific performance in many price-increase situations (for example, when seller has a supply of the goods and should have foreseen the price rise) e.g. *Neal-Cooper Grain Co. v. Texas Gulf Sulfur Co.*, 508 F.2d 283, 293 (7th Cir. 1974). For cases which have dealt with the conflict between §§ 2-615 and 2-716 see *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 19 UCC REP. SERV. 721, 731-39 (S.D. Fla. 1975); *G.W.S. Serv. Stations, Inc. v. Amoco Oil Co.*, 75 Misc. 2d 40, 44-45, 51, 346 N.Y.S. 2d 132, 137-38, 143 (Sup. Ct. 1973). See also Schmitt & Pasterczyk, *Specific Performance Under the Uniform Commercial Code—Will Liberalism Prevail?*, 26 DE PAUL L. REV. 54, 66-76 (1976).

²²⁹ The court noted that:

Under [§ 9-306(3)] if the security interest in the original collateral was perfected and the filed financing statement covering the original collateral also covers proceeds, as is true in the present case, the security interest in the proceeds is a "continuously perfected security interest." And under [§ 9-205] "[a] security interest is not invalid or fraudulent against creditors by reason of liberty in the debtor to use, commingle or dispose of all or part of the collateral . . . or to use, commingle or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral." Although neither of these statutory provisions speaks directly to the problem with which we are here concerned, they do indicate strongly the spirit in which the Uniform Commercial Code is to be applied.

²³⁰ 26 N.C. App. 690, 693, 217, S.E.2d 108, 110-11. The court then invoked common law through § 1-103 to decide the case. *Id.* at 694, 217 S.E.2d at 111.

²³¹ 26 N.C. App. at 695, 217 S.E.2d at 111.

²³² *Id.*, 217 S.E.2d at 112.

²³³ *Id.*

would result in secured parties insisting on separate bank accounts for proceeds, would have been more consistent with Code policy than permitting tracing of assets in a mingled bank account.²³³ Even if the court's conclusion were correct that common law tracing should supplement the Code, a decision more mindful of the policies of the Code would have been preferable.

The necessary implication of sections with broad language under a code is that the direction to be taken will be supplied within the code itself. The purposes and policies of the Uniform Commercial Code should be the source of expansion of the commercial law, not pre-Code rules. If the drafters intended that the Code's broad provisions be supplemented by old law they could merely have included that law in the Code—there would have been no need to draft broadly. Pre-Code law should only supplement Code policy. It clearly is error for the court to resort to outside law without exploring purposes and policies of the Code first.

c. *Methodology When the Code is Ambiguous.* The problems for courts in determining the proper relationship of section 1-103 and true code methodology are exacerbated when the Code language is contradictory, unclear, or hopelessly confused. Nevertheless, the priority system—Code language, Code policy, common law—can still be employed to solve these problems. Sometimes when express Code language is ambiguous, Code purposes and policies will be sufficiently clear so that the section 1-103 route may be avoided entirely. That is proper since under section 1-103, common law was not meant to be employed in *explaining* Code provisions. In some situations, such as *In re Kravitz*,²³⁴ through close analysis a court may conclude that both express Code language and Code purposes and policies are hopelessly unclear or contradictory. Where that is so, a resort to common law is justified. The failure of the courts to find answers within the Code under these circumstances is a result of the weakness of the Code itself—not judicial conservatism.²³⁵

III. SPECIFIC ARTICLE 2 REMEDIES PROBLEMS: SOLUTIONS VIA THE PRIORITY SYSTEM

Thus far the proposed three step methodology for Code construction—express Code language, Code purposes and policies,

²³³ Although most of the case law is in accord with *Michigan National Bank*, see *Brown & Williamson Tobacco Corp. v. First Nat'l Bank*, 504 F.2d 998, 1002 (7th Cir. 1974) and cases cited therein, Professor Gilmore, the principle draftsman and reporter for Article 9, suggested that proceeds cease to be identifiable when deposited in a bank account with other funds and the security interest is lost. See 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 27.4 at 735-36 (1965).

²³⁴ 278 F.2d 820, 821-22 (3d Cir. 1960). See notes 135-45 and accompanying text *supra* for a discussion of the case.

²³⁵ Perhaps a continued resort to common law in a given area should suggest to the Permanent Editorial Board that that portion of the Code should be redrafted. Article 9 of the Code was redrafted in 1972 in part because of the many independent

and common law—has been generally discussed in connection with several cases involving varied fact situations. In this section a more detailed discussion of the proposed priority system will be set forth in the analysis of some particularly troublesome construction problems in the remedies provisions of Article 2 of the Code. First the problem of conflicting Code policies regarding seller's and buyer's election of remedies will be analyzed. A brief discussion of courts' responses to these conflicting policies will then be set forth, followed by a suggested resolution of the problem. Problems involving restitution will then be analyzed with an approach being suggested for dealing with Code silence. It is hoped that by close analysis and discussion of the applicability of the proposed methodology to a few particular thorny construction problems, the general applicability of the priority system will be more clearly demonstrated.

A. Sellers' and Buyers' Election of Remedies Problems

Under Article 2 of the Code both seller and buyer have certain alternative remedies available to them upon breach. When "seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance . . ." ²³⁶ buyer may, among other choices, ²³⁷ "cover" under section 2-712²³⁸ or seek the market-contract differential under section 2-713.²³⁹ When buyer wrongfully rejects or revokes

amendments to the 1962 version which states had adopted and which had reduced its uniformity. See generally Coogan, *The New UCC Article 9*, 86 HARV. L. REV. 477, 479, 482-83 (1973).

²³⁶ U.C.C. § 2-711.

²³⁷ Section 2-711(2) provides that buyer may recover identified goods under § 2-502 or obtain specific performance or replevy the goods in a proper case under § 2-716.

²³⁸ Section 2-712 provides in full:

(1) After a breach within the preceding section the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

(2) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not bar him from any other remedy.

See also J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 6-3 (1972) [hereinafter cited as WHITE & SUMMERS].

²³⁹ Section 2-713 provides in full:

(1) Subject to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-delivery or repudiation by the seller is the difference between the market price at the time when the buyer learned of the breach and the contract price together with any incidental and consequential damages provided in this Article (Section 2-715), but less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, in cases of rejection after arrival or revocation of acceptance, as of the place of arrival.

acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole²⁴⁰ seller may, among other choices,²⁴¹ resell under section 2-706²⁴² or seek the contract-market differential under section 2-708(1).²⁴³ Buyer's "choice" of cover or market-contract damages and seller's "choice" of resale or contract-market damages are thus the mirror image of each other,²⁴⁴ and many of the same problems exist on each side of the remedies scale. One of the most unsettled problems in Code construction, however, is whether a buyer who has covered or a seller who has resold is still permitted to elect the higher contract-market differential.²⁴⁵

1. Buyers' Election

Consider the following problems. On April 10 seller breaches a contract to sell certain machinery for \$5000 to buyer. Buyer learns of the breach on April 11 when the market value of the equipment is \$5200. Buyer covers on April 15 for \$5100 (the market value has decreased or buyer simply gets a "good" deal).²⁴⁶ Under section 2-713 buyer's general damages recovery would be \$200—the difference between the market value when buyer learned of the breach and the contract price, while under section 2-712 buyer's general damages recovery would be \$100—the difference between the cover price and

²⁴⁰ U.C.C. § 2-703.

²⁴¹ Under § 2-703 seller may also withhold delivery, stop delivery by a bailee, invoke § 2-704 concerning seller's right to identify goods or to salvage goods, recover the price in a proper case under § 2-709, or cancel.

²⁴² Section 2-706(1) provides in full:

(1) Under the conditions stated in Section 2-703 on seller's remedies, the seller may resell the goods concerned or the undelivered balance thereof. Where the resale is made in good faith and in a commercially reasonable manner the seller may recover the difference between the resale price and the contract price together with any incidental damages allowed under the provisions of this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

See also WHITE & SUMMERS, *supra* note 238, at § 7-6.

²⁴³ Section 2-708(1) provides in full:

(1) Subject to subsection (2) and to the provisions of this Article with respect to proof of market price (Section 2-723), the measure of damages for non-acceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this Article (Section 2-710), but less expenses saved in consequence of the buyer's breach.

²⁴⁴ See, e.g., WHITE & SUMMERS, *supra* note 238, at 216.

²⁴⁵ See, e.g., *id.* at 190-91, 222-24.

²⁴⁶ "The Code directs the courts to accept virtually any evidence [of market price], even that with marginal relevance." WHITE & SUMMERS, *supra* note 238, at 190. See, e.g., U.C.C. § 2-713 Comments 2 & 3, and § 2-723. With a wide range of evidence admissible, the market-price of the goods established at trial for the date buyer learned of the breach often may be different from the actual price at which buyer purchased substitute goods, either on the date buyer learned of the breach or later. Of course, the price of buyer's substitute purchase in some situations will be the best evidence of market price.

the contract price. Does buyer have the right under the Code to elect damages based upon the section 2-713 market price-contract price differential? Nothing in the Code clearly determines the answer to this question.

Some commentators have argued that buyer should not be permitted to elect damages based upon the section 2-713 market price-contract price differential when buyer has favorably covered under section 2-712.²⁴⁷ The proponents of this position argue as follows: First, section 2-711(1) expressly states that buyer may cover or elect section 2-713 damages suggesting that buyer cannot do both.²⁴⁸ Second, section 2-713, Comment 5 states that: "The present section provides a remedy which is completely alternative to cover under the preceding section and applies only when and to the extent that the buyer has not covered."²⁴⁹ Third, Code policy suggests that there should be no right of election. Section 1-106 provides that remedies are to be "liberally administered" to put the injured party "in as good a position as if the other party had fully performed" Under an election approach, buyer is permitted to "play" the market—learning of the breach when the market is high, covering when it drops and then electing the section 2-713 market-contract differential—a right which puts the aggrieved party in a better position than if there had been full performance, and which seemingly conflicts with the "good faith" notions of the Code.²⁵⁰

On the other hand, advocates of an election approach argue that "nothing supporting [Comment 5] can be found in the text of section 2-713."²⁵¹ In addition, they note that there is no similar limitation with respect to seller's remedies either in the Code comments or expressly in the text.²⁵² These scholars also resort to the Code's purposes and policies and argue that to preserve a "parity of remedy for buyers and sellers,"²⁵³ to be consistent with the Code's distaste for election of remedies concepts, to ease administrative difficulties such as proof problems,²⁵⁴ and to encourage market substitutes, all of

²⁴⁷ See, e.g., WHITE & SUMMERS, *supra* note 238, at 190-91.

²⁴⁸ It is interesting that there is no such disjunctive on the seller's side in § 2-703.

²⁴⁹ On the use of Comments in Code construction, see notes 164-65 & accompanying text *supra*.

²⁵⁰ See WHITE & SUMMERS, *supra* note 238, at 190-91. Such a right also conflicts with the policy of mitigation of damages which is included in the Code. See U.C.C. § 1-106, Comment 1; Hillman, *Keeping the Deal Together After Material Breach—Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts*, 47 COLO. L. REV. 553, 580-81 (1976).

²⁵¹ Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods Under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199, 260 (1963). Professor Peters does acknowledge that § 2-711 "states its alternatives in a sequence consistent with Comment 5" *Id.*

²⁵² Peters, *supra* note 251, at 260.

²⁵³ *Id.* at 261.

²⁵⁴ *Id.* Peters suggests that "[I]t would be most difficult to ferret out from a reluctant complainant information about transactions sufficiently related to the contract in breach to qualify as cover or resale." *Id.*

which are consistent with the Code's "overall interest in keeping goods moving in commerce as rapidly as possible," an election for the buyer must be preserved.²⁵⁵

2. Sellers' Election

The identical controversy exists on the seller's side. Should a "greedy" seller be permitted to recover greater section 2-708(1) contract-market damages when the seller has resold at more than market price?²⁵⁶ Again, commentators acknowledge that the Code is not clear on this issue and resort to Code policy for the answer.²⁵⁷ Again, Code policy conflicts. The policies discussed on each side of the issue with respect to buyer's election all apply here.²⁵⁸ In addition, however, one legislative history argument and another Code comment both suggesting that seller has a right of election are often cited on the seller's side. In response to a New York Law Revision Commission recommendation, the language "so far as any goods have not been resold," was deleted from the beginning of the phrase "recover damages for their non-acceptance," in the section 2-703 listing of seller's remedies in order to allow a seller to "have a free choice between the amount received on resale (§ 2-706) and damages based on market price (§ 2-708)."²⁵⁹ Section 2-703, Comment 1, also seems clearly to suggest that seller has a right of election even after reselling: "[T]his Article rejects any doctrine of election of remedy as a fundamental policy and thus the remedies are essentially cumulative in nature" Thus a court presented with an election of remedies problem involving either a buyer or a seller will be confronted with conflicting Code purposes and policies.

3. Case Law

Very little case law has, as of yet, dealt with the election problem. As might be suspected, cases which have touched the election

²⁵⁵ Peters, *supra* note 251, at 261.

²⁵⁶ See, WHITE & SUMMERS, *supra* note 238, at 223.

²⁵⁷ See *id.*

²⁵⁸ See text accompanying notes 247-55 *supra*.

²⁵⁹ Honnold, *Analysis of Sections of Article 2*, in NEW YORK LAW REVISION COMMISSION, REPORT OF THE LAW REVISION COMMISSION FOR 1955: 1 STUDY OF THE UNIFORM COMMERCIAL CODE 355, 551 (1955). The reasons for permitting an election, Professor Honnold explained, were largely administrative—difficulties in determining the propriety of seller's resale. *Id.* at 551. Moreover, the result "hardly seem[ed] subject to serious abuse. Resale above the market price will be rare, and perhaps should be rewarded." *Id.* at 552. See WHITE & SUMMERS, *supra* note 238, at 223; Peters, *supra* note 251, at 260-61. Professors White and Summers "combat" the legislative history argument as follows:

"Nothing in their report suggests that they considered the case in which 2-706 recovery would be small because the seller sold at a price very near to the contract price yet the contract-market differential under 2-708 would be large." WHITE & SUMMERS, *supra* note 238, at 224. On the difficulties involved in employing legislative history in Code construction generally, see WHITE & SUMMERS, *supra* note 238 at 10. Nevertheless, the au-

issue under the Code are not uniform in their solution to the problem. Some seem to indicate that the right of election is unaffected by whether the injured party has covered or resold.²⁶⁰ In *Dehahn v. Innes*,²⁶¹ for example, a seller, upon breach by buyer, resold the farm equipment buyer had contracted to buy.²⁶² The court held that seller was entitled to the difference between the contract price and the fair market value of the goods at the time of the breach,²⁶³ stating:

We hold that section 2-703 which enumerates the seller's remedies, where the buyer [breaches] are cumulative between the right to . . .

"Resell and recover damages as hereafter provided (section 2-706); and . . .

Recover damages for nonacceptance (section 2-708)"²⁶⁴

Other courts when faced with the election of remedies problem indicate that while there may be no obligation to effect cover or to resell, if the injured party does proceed in that manner he may recover damages only via the cover or resale formula. An example of this approach is found in *Flood v. M.P. Clark, Inc.*²⁶⁵ In that case a seller contracted to deliver 350 bags of potatoes every ten days.²⁶⁶ When seller breached by failing to make ten deliveries, or 3,500 bags of potatoes,²⁶⁷ buyer effected cover as to about 1400 bags. Buyer claimed it was entitled to the difference between the market price and the contract price of 3,500 bags of potatoes.²⁶⁸ The court, however, limited buyer's recovery to the difference between the cover price and the contract price for the potatoes actually purchased in substitution, stating "[t]he law is clear that while a party is under no obligation to effect cover, if he does so, he may recover as damages

thors believe that the New York Law Revision Commission work is of "greater value" than prior drafts of the Code. *Id.*

²⁶⁰ Cf. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 294 (7th Cir. 1974) ("failure to cover does not bar any remedy except consequential damages").

²⁶¹ 356 A.2d 711 (Me. 1976).

²⁶² *Id.* at 720.

²⁶³ *Id.*

²⁶⁴ *Id.* at 721-22. The court noted that the Maine Code Comment supported this interpretation. *Id.* at 722, citing ME. REV. STAT. ANN. tit. 11 § 2-706, Maine Code Comment to subsection (3). In *Dehahn*, it should be noted, the seller was not attempting to take advantage of an unusually good resale price, but rather was attempting to avoid difficulty with the fact that he had failed to notify the breaching buyer of his resale. 356 A.2d at 721. If he were held to have elected his resale remedy, then his failure to notify the breaching party would prevent him from receiving any damages at all from the breaching party. *Id.* To avoid this outcome, the court allowed the defendant to elect to recover the difference between the contract price and the fair market value, and used the resale price as evidence of the market price of the goods sold. *Id.* at 720-22.

²⁶⁵ 335 F. Supp. 970 (E.D. Pa. 1971).

²⁶⁶ *Id.* at 970.

²⁶⁷ *Id.* at 971.

²⁶⁸ *Id.*

only the difference between the cost of his cover and the contract price."²⁶⁹

4. Resolution

Should courts faced with an ambiguous express Code position on the election problem attempt to sift through what are arguably contradictory Code purposes and policies in reaching a conclusion on the issue; or should a resort to section 1-103 common law be permitted to *supplement* the Code in this situation? Since Code language is ambiguous and policies are at loggerheads—*i.e.*, there is no clear cut and uncontested Code policy to apply—a resort to common law should be permitted. An additional method of approaching the problem is to argue that the court is faced with a Code silence problem, not an ambiguity problem—there are no affirmative statements in the Code with respect to the election issue when the seller and buyer have already resold or covered. Furthermore, the Code does not expressly mention the avoidable consequences principle—of possible help in solving the dilemma—in relation to the problem.²⁷⁰ Thus, the presumption that common law applies to supplement the Code arises and since Code purposes and policies themselves conflict, the presumption is not rebutted.

Unlike the Code, which has no clear solution to the election of remedies problem, the common law offers some definite guidelines. The common law avoidable consequences rule, also known as the "duty to mitigate damages" provides that damages which are avoidable by reasonable actions of the injured party are not recoverable in an action for the breach.²⁷¹ One principal component of the rule re-

²⁶⁹ *Id.*, citing *Delmont Gas Coal Co. v. Diamond Alkali Co.*, 275 Pa. 535, 119 A. 710 (1923). In reaching its conclusion the court did not cite the Code at all, although in an earlier hearing on the merits the same judge reached the same conclusion citing § 2-712(2). 319 F. Supp. 1043, 1047 (E.D. Pa. 1970). In both opinions the court noted that one reason for its limitation of recovery to the actual cover was that the contract did not *clearly* require a total delivery of 3,500 bags but rather required delivery every 10 days of the number of bags buyer requested, 350 bags being an estimation of buyers' needs. 335 F. Supp. at 971, 319 F. Supp. at 1047-48. Thus, the best indication of buyer's actual damages, according to the court, was the amount by which buyer covered. 335 F. Supp. at 971, 319 F. Supp. at 1048.

²⁷⁰ The avoidable consequences principle is included in the Code. *See, e.g.*, U.C.C. § 1-106, Comment 1 (the Code "makes it clear that damages must be minimized"). *See also* §§ 2-712(2) and 2-715(2)(a) providing that damages are reduced by the amount of expenses saved by buyer as a result of breach and permitting buyer to recover consequential damages "which could not reasonably be prevented by cover or otherwise;" and § 2-709(1)(b) permitting seller to recover the price but only if seller makes an effort to resell and cannot. Nevertheless, the Code nowhere expressly indicates whether the right of election of contract-market differential is available after cover or resale. It is not clear whether this means that the avoidable consequences principle was excluded with respect to this issue. The bankruptcy of employing statutory construction rules suggests that a presumption should arise that the principle supplements the Code.

²⁷¹ *Warren v. Stoddart*, 105 U.S. 224, 229 (1881); 5A CORBIN, CORBIN ON CONTRACTS § 1039 (1964).

quires the injured party to minimize damages suffered from the loss of a bargain by entering into substitute transactions where reasonable.²⁷² Whether the injured party's common law duty to enter into substitute transactions applied to sales cases to limit the injured party's general damages when an opportunity was ignored,²⁷³ is far from clear.²⁷⁴ What is generally clear however, is that if the aggrieved party actually did enter into a substitute transaction and thereby lessened his loss—e.g., an aggrieved buyer purchased substitute goods at \$5100 when contract price was \$5000 and market value \$5200—the injured party could recover only for the actual loss caused by the breach.²⁷⁵

How then, should the "duty" to mitigate principle be employed to solve the Code election dilemma? The court should first note that Code language is unclear or silent on the issue and that Code purposes and policies are contradictory. The court should then indicate that under section 1-103 common law may therefore be employed. Since at common law the aggrieved buyer's or seller's damages would be limited by an effective cover or resale, so too should those damages be limited under the Code.²⁷⁶

A breaching party would have a much more difficult time convincing a court that if a favorable cover or resale was available and ignored before the injured party had changed its position, the injured party is limited to damages based upon the measures afforded by the

The use of the word "duty" is incorrect. Failure to mitigate does not give rise to a cause of action, it merely restricts damages of the injured party to those which could not have been avoided. *Id.*; See Hillman, *supra* note 250, at 554 n.1. C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 33 at 128 (1935).

²⁷² See C. McCORMICK, *supra* note 271, § 33, at 127.

²⁷³ The distinction between general and special or consequential damages is that: the former arise naturally from the breach and are implied or presumed by the law. The latter do not arise naturally; they are not within the common experience of mankind as arising in the particular situation and, therefore, they are not implied or presumed by the law.

J. MURRAY, *Murray on Contracts* § 225 at 454 n.48 (2d ed. rev. 1974). General damages would include the contract-market differential formula set forth for both buyer and seller in the Code. See U.C.C. §§ 2-708(1) & 2-713.

²⁷⁴ For cases supporting such a proposition see 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1387 at 422 (3d ed. 1968); *Lawrence v. Porter*, 63 F. 62, 66 (6th Cir. 1894); *Coos Lumber Co. v. Builders Lumber & Supply Co.*, 104 N.H. 404, 408, 188 A.2d 330, 332-33 (1963). But see McCORMICK, *supra* note 271, at 668; *Banks v. Pann*, 82 Cal. App. 20, 24, 254 P. 937, 938 (1927); *Seward v. Pennsylvania Salt Mfg. Co.*, 266 Pa. 457, 461, 109 A. 617, 618 (1920).

²⁷⁵ See Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1190 (1970). See also *Sloss-Sheffield Steel & Iron Co. v. Stover Mfg. & Engine Co.*, 37 F.2d 876, 877 (7th Cir. 1929); *May Hosiery Mills v. Munford Cotton Mills*, 205 Ala. 27, 29, 87 So. 674, 676 (1920); *Delmont Gas Coal Co. v. Diamond Alkali Co.*, 275 Pa. 535, 539, 119 A. 710, 711 (1923); *Donald W. Lyle, Inc. v. Heidner & Co.*, 45 Wash.2d 806, 817, 278 P.2d 650, 656-57 (1954).

²⁷⁶ It is at least arguable that Code purposes and policies do not really conflict on the election issue but suggest that no election is permitted. See notes 281-85 & accompanying text *infra*. If the policies are clear that no election should be permitted, of course, common law would not be invoked at all.

cover or resale sections. For example, suppose buyer agrees to buy and seller agrees to sell 100 widgets for \$100, delivery on July 1. On that date, seller is unable to deliver because it has no inventory of widgets remaining. The market value of the widgets is \$125 on July 1 and thereafter. A few days later, before buyer has changed its position and while buyer still needs the widgets, seller acquires some widgets and makes a new offer to deliver them to buyer at \$105.²⁷⁷ The issue arises whether a buyer may ignore the new offer and recover the market price-contract price differential. Similarly, if a third party offered the widgets to buyer after the breach at less than \$125 should buyer be permitted to ignore that offer and recover the market price-contract price differential? A similar hypothesis could be constructed on the seller's side.²⁷⁸

Some express Code language suggests that the injured buyer need not effect cover when either the breaching party or a third party offers substitute goods at less than the market price when buyer learned of the breach—*i.e.*, when accepting such an offer would lessen damages—and that the injured buyer can still elect damages based upon the market price-contract price differential under 2-713.²⁷⁹ This language may prove successful for the injured party at least on the buyer's side. In addition, the distaste for election of remedies in the Code and the legislative history argument emphasizing the availability of choice on the seller's side suggest that the injured party should not be barred from recovering the market price-contract price differential.²⁸⁰ Nevertheless, there are some arguments that can be made on the breaching party's behalf. Permitting a recovery of the market price-contract price differential when the injured party has ignored a favorable available cover or resale is at least arguably contrary to Code purposes and policies. The Code seeks to support expectations—to put the injured party in "as good a position as if the other party had fully performed . . .,"²⁸¹ not a better one, so that waste is avoided and the economy spurred.²⁸² Thus, the injured party should be limited to damages based on the cover or re-

²⁷⁷ Seller may wish to save the deal, good will, and reputation and thus offer to sell at less than market price, but still be financially unable to perform at contract price. For further discussion of "when" an injured party should be "required" to accept new offers from breaching parties, see Hillman, *supra* note 250.

²⁷⁸ Assume the same hypothetical, except seller's perfect tender on July 1 is refused by buyer and the market value of the widgets is \$80. A few days later, before seller has changed position, buyer offers to purchase for \$90. Can seller ignore the new offer and recover the contract price-market price differential?

²⁷⁹ See, e.g., U.C.C. § 2-712(3): "Failure of the buyer to effect cover within this section does not bar him from any other remedy."

²⁸⁰ See note 259 & accompanying text *supra*.

²⁸¹ U.C.C. § 1-106(1).

²⁸² By supporting expectations the remedial system encourages parties to enter into contracts which benefit the economy by inducing specialization and efficiency. See Hillman, *supra* note 250, at 556-57. The expectancy system, however, eliminates economic waste by awarding only those damages that are unavoidable. Injured parties are therefore encouraged to enter into substitute transactions. *Id.* at 558-59.

sale formula when cover or resale is available and would result in less damages than the market-contract differential. The injured party is simply not injured by the breach to an extent any greater than these measures afford. Is the buyer in the hypothetical, who has not changed position and still needs the goods and is offered cover at \$105 when contract price is \$100 and market price \$125, injured to the extent of \$5 or \$25? It would seem the buyer's injury is only \$5. Any further injury is not *caused* by the breach but by buyer's refusal to accept the new offer.

It may also be contended that other Code policies really do not conflict with limiting damages to the available cover or resale. The election of remedies argument may prove too much. An injured party should not be permitted to elect remedies, and indeed, the Code could not have intended to permit an election, when the end result would be to put the injured party in a better position than before the breach and to penalize the breaching party. In addition, "election" opponents have noted that the policy of encouraging market substitutes would obviously be furthered by limiting damages to cover or resale measures when they are available: "The draftsmen unquestionably intended that 2-713 take a backseat to 2-712 and certainly did not intend to offer an incentive (in the form of a higher damage award) which would influence buyers not to use 2-712."²⁸³

Although Code policies arguably support an approach which limits damages to the available cover or resale measures, the express language of the Code in section 2-712(3) supporting the availability of section 2-713 market-contract damages when the injured buyer has passed up a substitute offer should probably prevail, at least with respect to buyer's remedies. If a breaching seller was able to persuade a court that the express text should not be literally applied, and that the Code policy arguments against an election for buyer should prevail, (or a breaching buyer prevailed on the Code policy arguments that an election for the seller should not be permitted), then under the priority system presented in this Article—Code policy over common law—a court would not have to consider common law mitigation of damages principles via section 1-103 which conflicted with this Code policy.²⁸⁴ Since it is the obligation of the injured party to avoid loss, a court could hold that resale or cover may be the only reasonable way of

²⁸³ WHITE & SUMMERS, *supra* note 238, at 182. The probable intent of § 2-713 is to award about the same recovery in non-cover cases as § 2-712 would have done. *Id.* at 182-83.

²⁸⁴ Similarly, a court would not have to resort to common law principles if a breaching buyer prevailed on Code policy arguments that an election for the seller should not be permitted.

At common law there is conflicting authority on whether an injured party could pass up a favorable substitute deal in sales cases. See note 274 *supra* & accompanying text. Nevertheless, the policy arguments in favor of limiting damages to the available cover or resale under the Code all applied at common law. See Hillman, *supra* note 250, at 575-76.

doing so when they are available.²⁸⁵

B. Restitution Under Article 2

Problems involving restitution under Article 2 are also excellent examples of the difficulties courts will continue to encounter in sorting out the proper roles of Code language, section 1-102 and section 1-103 in problem-solving under the Code. The restitution interest is de-emphasized in Code remedial law in favor of the expectation interest.²⁸⁶ It has been argued, however, that under some circumstances a restitutionary recovery by an aggrieved party may be more "equitable" than protecting the party's expectation interest.²⁸⁷

1. Breaching Sellers' Recovery

Consider the following hypothetical. Seller and buyer enter a contract in which seller promises to deliver 100 widgets for \$1,200. The market value of the widgets is \$10 per widget. Seller delivers eighty widgets, but then is unable to complete the delivery.

At common law and under the Uniform Sales Act a breaching seller could recover for the widgets accepted either at the contract rate or at a rate commensurate with the fair value of the widgets delivered, depending on whether buyer accepted the widgets with knowledge that seller would not perform completely. If buyer had such knowledge and still accepted, buyer would have to pay at the greater contract rate, \$12/widget or \$960, but if buyer had no knowledge of the breach when the widgets were accepted, and the goods were used or sold, buyer would only have to pay the fair value of what was ac-

²⁸⁵ Whether the injured party has acted reasonably is a question of fact. Hillman, *supra* note 250, at 555 n.6.

²⁸⁶ "[T]he draftsmen's pre-occupation with performance carried over to the remedies and resulted in almost a total absence of any development of restitution recoveries." Nordstrom, *Restitution on Default and Article Two of the Uniform Commercial Code*, 19 VAND. L. REV. 1143, 1150 (1966).

The expectation interest is "whatever [the injured party] would have gained had the promise been performed." MURRAY, *supra* note 273, at 438. The restitution interest compels the breaching party to return the enrichment conferred by the injured party so that the injured party is restored to the position he enjoyed prior to the agreement. *Id.*

There are some restitutionary remedies available in Article 2. For example, §§ 2-507 and 2-511 permit specific restitution of goods sold for cash if buyer fails to pay or buyer's check is dishonored. Buyer may get a refund under §2-711 when seller fails to deliver. Even if buyer repudiates under § 2-718 buyer is entitled to partial restitution of prepayments.

In shaping Code remedies, Professor Nordstrom argues that the reliance, restitutionary, and expectancy interest should be "balanced." Nordstrom, *supra* at 1148. Nordstrom suggests that there may have been no conscious policy to omit restitutionary interests: "Perhaps . . . restitution defies statutory codification, and a case by case development which considers the impact of each case is the only path which holds promise of an adequate development of restitutionary ideas." *Id.* at 1181.

²⁸⁷ Nordstrom, *supra* note 286, at 1181.

cepted (up to the contract price)—here \$10 per widget or \$800.²⁸⁸ Seller would, of course, be liable to buyer for damages seller caused buyer.

The Code also permits the defaulting seller to recover for goods accepted, but does not include the fair value measure—buyer must pay for goods accepted at the contract rate.²⁸⁹ Thus, seller is still permitted a portion of the profit even though in default. One commentator points out that acceptance can occur under the Code “even though buyer did not intend to keep the goods,”²⁹⁰ and argues that the Code should have included a “fair value” measure. The commentator then implies that courts should look to section 1-103 to “repair” the situation:

It is regretted . . . that the emphasis placed upon the expectation interest overshadowed a measure of recovery similar to the “fair value” treatment given the defaulting seller under the Uniform Sales Act. Perhaps Courts will be wise enough . . . to consider Code cases with an emphasis upon the seller’s restitution interest, rather than to allow the seller to recover a part of his profit even though he is in substantial default.²⁹¹

This solution, however, would not be in accord with the proposed methodological approach proposed in this article. The Code has expressly provided that the measure of recovery to seller for goods accepted is the contract rate and does not expressly apply the restitution principle to a claim by a defaulting seller. What is the significance of the Code’s silence on restitution? Under the priority system suggested in this Article for filling gaps such as the Code’s silence on restitution, common law restitution limiting seller’s recovery when in default to “fair value” would not be available because Code purposes and policies conflict with such a limitation on the seller’s recovery.

There are many opportunities under the Code for the buyer to

²⁸⁸ *Id.* at 1178-79. See RESTATEMENT OF CONTRACTS § 357 (1932).

²⁸⁹ Nordstrom, *supra* note 286, at 1179; U.C.C. § 2-607(1).

²⁹⁰ See Nordstrom, *supra* note 286, at 1179-80 & n. 155. U.C.C. § 2-606 provides:

(1) Acceptance of goods occurs when the buyer

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of Section 2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller’s ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

²⁹¹ Nordstrom, *supra* note 286, at 1180 (footnote omitted).

return the goods to the seller.²⁹² Buyer will be "stuck" with them and the concomitant duty to pay the contract price only if buyer has accepted them²⁹³ and has failed to make an effective revocation of acceptance.²⁹⁴ When rejection and revocation of acceptance are unavailable to buyer a judgment has been made by the drafters of the Code that the buyer ought to be liable for the full price.²⁹⁵ For example, if buyer waits an unreasonable length of time to attempt to reject perishable goods because of a substantial and easily identifiable quantity defect, during which time the goods spoil, the Code provides that rejection and revocation of acceptance are unavailable and buyer must pay the contract price for the goods received.²⁹⁶ Applying common law restitution to limit breaching seller's recovery to less than contract price would conflict with this policy. Additionally, the Code remedial policy of fostering commercial activity by supporting expectations without punishing²⁹⁷ suggests that a defaulting seller

²⁹² See U.C.C. §§ 2-602 (rejection) & 2-608 (revocation of acceptance).

²⁹³ See note 290 *supra* for the Code definition of acceptance. The effect of acceptance is to preclude rejection under most circumstances. See U.C.C. §§ 2-607(2) & 2-608.

²⁹⁴ U.C.C. § 2-608 provides that:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it

(a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or

(b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

²⁹⁵ The judgment that buyer must pay the contract price when rejection and revocation are unavoidable includes only a few situations in which buyer has accepted without knowledge of the breach. Reading §§ 2-606 and 2-608 together, it appears that buyer will be required to pay contract price for goods he does not want to keep: (1) when buyer had had reasonable opportunity to inspect and incorrectly signifies that the goods are conforming (§ 2-606(1)(a)); (2) when buyer does an act inconsistent with seller's ownership or waits too long to reject because of buyer's negligence in not discovering the defect (§ 2-606(1)(b) & (c)); (3) when buyer does an act inconsistent with seller's ownership or waits too long to reject because of the difficulty of discovery or seller's assurances, but buyer does not revoke acceptance within a reasonable time (§§ 2-606(1)(b) & (c), 2-608(1)(b), 2-608(2)). Buyer also will be required to pay the contract price for defective goods when he accepts on the reasonable assumption of cure and the goods are not cured, but again only if buyer has waited too long to revoke acceptance (§ 2-608(1)(a)).

In all of the above situations it seems fair to require buyer to pay contract price since it is lack of due care which results in the obligation to keep and pay for the goods. For a more elaborate discussion of the requirements for effective rejection and revocation of acceptance see J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE, § 8-3 (1972).

²⁹⁶ U.C.C. §§ 2-606(1)(b), 2-602(1), 2-608(2).

²⁹⁷ See note 282 & accompanying text *supra*.

who delivers goods which are accepted by buyer even without knowledge that seller would subsequently default should be paid the contract price, unless, of course, the goods are not as valuable to buyer as a result of the breach. The Code's emphasis on expectations and de-emphasis of restitution is itself a policy which should not be circumvented by section 1-103. Since Code policies conflict with applying restitution, it should not be applied.

2. Breaching Buyer - Seller's Recovery

Consider another hypothetical—seller and buyer enter a contract in which seller promises to deliver 100 widgets per month for one year for \$1,200, payment at the end of the year. Buyer accepts delivery for six months when the market value of each widget is \$2.00, but refuses delivery thereafter, when the value of each widget drops to 50 cents.²⁹⁸ Seller's Code recovery would be \$900,²⁹⁹ while if seller was permitted common law restitution, seller's recovery would be \$1,200.³⁰⁰

On a similar fact pattern, one theorist argues that buyer's breach is a repudiation, enabling seller to elect remedies via section 2-703. Under that section seller can cancel, which is defined in section 2-106(4) as putting an "end" to the contract. Upon cancelling seller is permitted "any remedy" for breach of the whole contract³⁰¹ which, it is argued, should include restitution through Section 1-103.³⁰²

How should a court decide this problem? If the court is permitted to resort to section 1-103, seller will recover an additional \$300. However, the seller must overcome several hurdles. Although Code silence—failure to draft with respect to restitution—suggests that resort to common law may be available,³⁰³ Code purposes and policies conflict with the restitutionary route here and mandate that it should not be employed. It would seem that the section 1-106 Code policy of fulfilling expectations, and no more, indicates that seller should be

²⁹⁸ See Nordstrom, *supra* note 286, at 1164, fact pattern 6.

²⁹⁹ Seller's recovery would include \$600 for the 600 widgets accepted, (2-703 and 2-709), and \$300 for the 600 widgets buyer refused to accept (2-708(1)).

³⁰⁰ Six hundred widgets were accepted by buyer worth \$2 each, therefore seller conferred a benefit of \$1,200 on buyer which would be returnable to seller at common law if the contract was considered to be entire. See Nordstrom, *supra* note 286, at 1165 &nn. 95-97.

³⁰¹ U.C.C. § 2-106(4).

³⁰² Nordstrom, *supra* note 286, at 1166.

³⁰³ The resort to statutory construction to determine whether restitution is available is not helpful. The relatively comprehensive treatment of the remedial provisions of Article 2 suggest that remedies omitted from its scope are excluded from coverage. Comment 1 to § 2-703 seems to indicate that § 2-703 is all-inclusive. "This section is an index section which gathers together in one convenient place *all* of the various remedies open to a seller for any breach by the buyer." U.C.C. § 2-703, Comment 1 (emphasis added). But the absence from this list of remedies which are available elsewhere suggests that the comment must be discounted. See, e.g., U.C.C. § 2-718.

unable to recover on a restitutionary basis. The notion of permitting a greater than contract recovery, under fire even at common law,³⁰⁴ is excluded by Section 1-106, since it will put an aggrieved party in a better position than if there had been no breach.³⁰⁵ An additional Code policy which may mandate denying a restitutionary recovery is the Code policy of fostering commercial dealings and practices.³⁰⁶ It is at least arguable that if defaulting buyers are forced to pay at greater than contract price it may deter them from making some contracts in the future.³⁰⁷ Thus, the resort to section 1-103 restitution concepts should be excluded.

CONCLUSION

An analysis of cases which have dealt with the proper use of express language, purposes and policies, and common law in Code problem solving, demonstrates that some of the problems of Code construction which were predicted by early analysts have in fact developed. For example, Professor Gilmore's prediction that common law would be relied upon as often as the Code³⁰⁸ is probably accurate. Further, the "invitation" to use common law in section 1-103 seems to have resulted in its invocation even when not envisioned by the Code drafters.

The positive steps taken by the courts to alleviate these problems involve a recognition that the Code has changed common law, in some instances dramatically,³⁰⁹ and that the Code rules must be utilized in solving commercial disputes. Furthermore, some courts' methodologies reflect the realization that the Code is more than a normal statute; that it is a unified source of solutions to commercial law problems. These courts have therefore looked to the principles and policies of the Code to fill in gaps and to interpret vague or overly broad language. If other courts begin to adopt this methodological approach and follow the priority system advocated here, then the overriding purposes of the Code of uniformity, simplic-

³⁰⁴ Palmer, *The Contract Price as a Limit on Restitutions for Defendant's Breach*, 20 OHIO ST. L. J. 264 (1959); D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 794-95 (1973).

³⁰⁵ If there had been no breach seller would have received \$1200 for the 1200 widgets. Under a restitutionary route, seller would receive \$1200 but would also be permitted to keep the 600 widgets.

³⁰⁶ U.C.C. § 1-102(2)(b). The Code contains many provisions designed to encourage contract-making and performance even after breakdown. See Hillman, *supra* note 250, at 579 & n. 127. See also note 282 *supra*.

³⁰⁷ See Hartzler, *The Business and Economic Functions of the Law of Contract Damages*, 6 AM. BUS. L. J. 387, 392 (1968). Professor Hartzler suggests that penalizing non-performance may result in "a limitation on the undertaking which the promisor is willing to accept." *Id.*

³⁰⁸ Gilmore, *Article 9: What It Does for the Past*, 26 LA. L. REV. 285, 286 (1966).

³⁰⁹ See e.g., note 34 *supra*.

ity, clarity and modernization of commercial law will not be thwarted.³¹⁰

³¹⁰ A significant contributing factor to the "de-codification" of the Code is its own drafting weaknesses. Confusing gaps, vagueness, and language with inconsistent or no definitional support pervade the Code. One commentator has noted that "the lack of internal consistency and clarity in the statute itself is the best possible assurance that in the long run construction will not be uniform." Mellinkoff, *The Language of the Uniform Commercial Code*, 77 YALE L. J. 185, 225 (1967). At least some of these problems were caused by the bartering and compromise that were necessary to get the Code through the state legislatures for the purpose of achieving uniformity. There lies the irony in the Code's failures. In attempting to achieve uniformity by passage in each of the states, the Code may have sacrificed the characteristics which would have made uniformity possible. Mellinkoff has further noted that "the path to uniformity was conceived to be the adoption by everyone of the same statutory words, regardless of what those words were, regardless of whether those words might be so ambiguous as to result in a thousand varying interpretations that ultimately achieve the very opposite of uniformity." *Id.* at 223. As a result the Code is nothing more than a "paste-up memorandum of agreement." *Id.*

BOSTON COLLEGE

INDUSTRIAL AND COMMERCIAL LAW REVIEW

VOLUME XVIII

APRIL 1977

NUMBER 4

BOARD OF EDITORS

ANNE LESLIE JOSEPHSON
Editor-In-Chief

DOUGLAS B. ADLER
*Topics and
Solicitations Editor*
RUSSELL F. CONN
Articles Editor
SUSAN C. COOPER
Articles Editor
GABRIEL DUMONT
*Articles and
Citations Editor*
JAMES F. KAVANAUGH, JR.
Articles Editor
DENNIS LAFIURA
Articles Editor
LYNNE E. LARKIN
Executive Editor

JAMES P. LAUGHLIN
*Business and
Managing Editor*
ALEXANDRA LEAKE
Articles Editor
ALICE SESSIONS LONOFF
Articles Editor
PHILIP D. O'NEILL, JR.
Executive Editor
WILLIAM D. SEWALL
*Articles and
Citations Editor*
HOWARD STICKLOR
Articles Editor
ANN E. WEIGEL
Articles Editor

THIRD YEAR STAFF

MICHAEL ABCARIAN
JUDY L. CHESSEY
ROBERT CORCORAN
BETTY FERBER

ROBERT E. FOX
STEPHEN R. LAMSON
JACK MIKELS

WILLIAM E. MODERI
JUDITH L. NOVICK
ANNE ELIZABETH ROGERS
JOAN C. STODDARD

SECOND YEAR STAFF

JEFFREY S. BERCOV
ANGELA M. BOHMANN
S. LAMONT BOSSARD, JR.
ROBERT M. CARMEN
RICHARD L. CASSIN, JR.
R. PETER CATLIN, III
MAUREEN FOX
BARBARA JOHNSTON GREEN
MARC W. GROSSMAN
PATRICK T. JONES

GORDON P. KATZ
CAMERON F. KERRY
STEPHEN W. KIDDER
JAMES C. KNOX
CAROL GLAUBMAN KROCH
DEBRA L. LAY
DAVID C. LUCAL
KENNETH J. MALLOY
JUDITH A. MALONE
HARRY L. MANION, III

ROBERT THOMAS MORGAN
THOMAS H. MURPHY, JR.
WILLIAM P. O'SHEA
MITCHELL S. PRESSMAN
RICHARD F. RINALDO
STEVEN LEWIS SCHRECKINGER
WILLIAM L. THORPE
SCOTT J. TUCKER
THOMAS J. URBELIS

FACULTY ADVISOR

PAUL R. MCDANIEL

MARSHA KELLY
Administrative Secretary

MARY BANFILL
Administrative Secretary